

Pre-Dispute Civil Rights Arbitration in the Nonunion Sector: The Need for a Tandem Reform Effort at the Contracting, Procedural and Judicial Review Stages

An Overview of Employment Community Reactions to Gilmer and Suggested Reforms

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I. INTRODUCTION

In the past decade, the private employment field has begun to experiment with the use of arbitration and other dispute resolution techniques in response to the explosion of federal employment litigation and claims that continue to strain judicial and administrative systems. Since the mid-1960s, the creation of employment laws protecting employee civil rights has increased at a dramatic rate, resulting in a complex regulatory system with varying procedures, requirements and remedies.¹ Subsequent efforts to enforce employee rights under these laws have overwhelmed the federal courts and the Equal Employment Opportunity Commission (EEOC). For example, a United States Department of Labor and Commerce report states that between 1971 and 1991, employment law cases filed in federal district courts increased 430%, from 4,331 in 1971 to 22,968 in 1991.² Between 1981 and 1993, the number of complaints filed with the EEOC increased 56%, from 56,228 in 1981 to 87,942 in 1993.³

Employers, faced with an increasingly litigious workforce, are

¹ Illustrative examples of employment laws promulgated since 1960 include the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1994) (prohibiting wage discrimination on the basis of sex); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1994) (prohibiting workplace discrimination on the basis of race, color, religion, sex or national origin); the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-634 (1994) (prohibiting workplace discrimination on the basis of age); the Older Workers Benefit Protection Act (OWBPA), 29 U.S.C. § 623 (1994) (amending the ADEA); the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1462 (1994) (protecting employee pension benefits); the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101-12213 (1994) (prohibiting discrimination on the basis of disability); the Civil Rights Act of 1991, 42 U.S.C. § 1981(a) (1994) (providing damages in cases of intentional discrimination); the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2601 (1994) (allowing employees to take leave for family and medical emergencies).

² See UNITED STATES DEPARTMENTS OF LABOR AND COMMERCE, FACT FINDING REPORT: COMMISSION ON THE FUTURE OF WORKER MANAGEMENT RELATIONS (1994).

³ See *id.*

responding by looking to extra-judicial channels to resolve disputes. Corporations are augmenting in-house dispute resolution channels to address potential lawsuits at an early stage as well as encouraging their employees to use private services specializing in mediation and post-dispute arbitration. One of the more controversial efforts of alternative dispute resolution is the use of pre-dispute arbitration clauses in employee contracts or corporate handbooks. A typical pre-dispute arbitration clause is a generic, broad statement essentially ensuring that the employee agrees to submit to binding arbitration any and all disputes arising under his employment. The nature of the pre-dispute arbitration clause has engendered the term "mandatory arbitration" because the prospective employee usually signs the contract *before* he begins work and before any potential issues arise with the employer. Thus, arbitration becomes "mandatory" even though not necessarily foreseen. At the moment an employee begins his job, he already has made the weighty decision *not* to look to the federal courts to enforce his civil rights under the myriad laws ensuring their protection.

For their part, the private nonunion employers generally have embraced arbitration as an efficient and cost-effective forum for resolving employment related disputes,⁴ including those involving civil rights. Not until the securities industry first initiated arbitration clauses as a pre-employment condition, however, did some in the labor and employment community seriously begin to question the fairness of arbitration for its participants. As the use of pre-employment arbitration clauses proliferated in the securities industry, certain actors concerned with labor and employment rights, including judges, executive agencies, private providers of alternative dispute resolution, employment analysts and others, began to consider the drawbacks of mandatory arbitration, especially when it was used to enforce federal civil rights.⁵

⁴ For example, Michael Hoellering, General Counsel of the American Arbitration Association (AAA), the nation's largest private provider of ADR services, stated that 95% of the arbitrations handled by the AAA last year were submitted by parties that had agreed on arbitration before a dispute arose. *AAA General Counsel Discusses Nonunion Employment Disputes*, Empl. Pol. & L. Daily (BNA), d9 (Feb. 17, 1995). See also R. Gaull Silberman et al., *Alternative Dispute Resolution of Employment Discrimination Claims*, 54 LA. L. REV. 1533, 1536 (1994) ("Employers increasingly are adopting internal ADR methods . . . as ADR procedures have improved and litigation grown more time-consuming and costly, doubts about whether ADR should play [any] role in civil rights enforcement have significantly diminished.") (citations omitted). Ms. Silberman is the Vice Chairman of the EEOC.

⁵ See, e.g., Mark D. Klimek, *Discrimination Claims Under Title VII: Where Mandatory Arbitration Goes Too Far*, 8 OHIO ST. J. ON DISP. RESOL. 425, 425 (1993) ("Absent an explicit ruling by the Supreme Court, agreements to arbitration such as [those involving Title VII disputes] should not be enforceable."); Wendy S. Tien, Note, *Compulsory Arbitration of*

These actors' critical responses to mandatory arbitration apparently correspond to the degree of voluntariness in selecting arbitration. When employees *voluntarily* choose arbitration, some of the skeptical commentators more readily acknowledge its benefits as an efficient and binding alternative to lengthy and costly judicial enforcement.⁶ Yet, as an employee's selection of arbitration becomes less voluntary, that is, when arbitration, especially of civil rights claims, becomes a *condition* of employment, the skeptics are less willing to accept arbitration as a means of enforcing civil rights.

As the debate surrounding the use of pre-dispute arbitration for resolving employment discrimination claims continues to rage, labor and employment rights actors have responded with various levels of intensity. Some participants advocate an outright rejection of mandatory arbitration for civil rights claims, while others focus on improving certain procedural aspects of the arbitration process. The reaction to arbitration as well as possible suggestions for reform may be more easily critiqued if the analysis focuses on three separate stages in the pre-dispute arbitration process: (1) the *formation* of the contract itself, (2) the *procedures* that govern the proceeding after arbitration is invoked, and (3) the availability of *judicial review* of arbitration decisions.

This paper focuses on the responses of the courts, the national legislature, the EEOC, private providers of ADR and certain policy groups, to the increasing use of mandatory arbitration. First, the paper gives a general overview of *Gilmer v. Interstate/Johnson Lane Corp.*,⁷ the seminal

ADA Claims: Disabling the Disabled, 77 MINN. L. REV. 1443, 1472 (1993) ("Congress did not intend binding arbitration to be an exclusive remedy for ADA disputes."); *see also* Brief of American Association of Retired Persons as Amicus Curiae in Support of Petitioner at 16-18, *Gilmer v. Interstate/Johnson Lane*, 500 U.S. 20 (1991) (No. 90-18) (arguing that compulsory arbitration is not appropriate forum for resolving discrimination claims). *But see* Rick Bales & Reagan Burch, *The Future of Employment Arbitration in the Nonunion Sector*, 45 LAB. L.J. 627, 635 (1994) ("Congress should not jeopardize the development of an arbitration system that can furnish fair and expeditious dispute resolution in the workplace."); Marshall W. Grate, *Binding Arbitration of Statutory Employment Discrimination Claims*, 70 U. DET. MERCY L. REV. 699, 719 (1993) ("[B]inding arbitration could . . . become the cornerstone of national labor policy."); Gerard Morales & Kelly Humphrey, *The Enforceability of Agreements to Arbitrate Employment Disputes*, 43 LAB. L.J. 663, 670 (1992) ("[E]nforcement of agreements to arbitrate disputes arising from individual employment contracts is entirely consistent with the established national policy favoring arbitration of labor disputes.").

⁶ *See, e.g.*, Tien, *supra* note 5, at 1472-1473 (arguing that voluntary arbitration of ADA disputes is acceptable, although binding arbitration is not).

⁷ 500 U.S. 20 (1991).

1991 United States Supreme Court case that opened the federal court floodgates for the use of pre-dispute arbitration. Second, the paper surveys the federal courts' response to *Gilmer*, listing which civil rights claims may be arbitrated according to the courts, surveying some recent decisions more critical of the arbitration process and analyzing the federal court use of judicial review of arbitration involving civil rights claims. Third, the paper summarizes the general responses of the legislature, the EEOC, private dispute resolution providers and employment policy groups regarding mandatory arbitration, and specifically analyzes where each group's response has focused among the three stages of mandatory arbitration. Finally, the paper analyzes the future direction of mandatory arbitration and offers solutions that focus on improving voluntariness at the contracting stage and expanding judicial review of arbitration.

II. *GILMER V. INTERSTATE/JOHNSON LANE CORP.*

In 1991, the Supreme Court, in the 7-to-2 decision *Gilmer v. Interstate/Johnson Lane Corp.*, signaled that it would accept the use of pre-dispute arbitration clauses, at least in the securities industry context, and thus encouraged federal court acceptance of mandatory arbitration clauses in the private employment sector.

Interstate/Johnson Lane Corp. employed Robert Gilmer as a Manager of Financial Services in May of 1981.⁸ As a condition of his employment, Interstate required him to register as a securities representative with several stock exchanges, including the New York Stock Exchange (NYSE).⁹ Gilmer completed a securities registration application form which provided that he and his employer would "arbitrate any dispute, claim, or controversy" arising between [them] . . . 'that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations' with which [Gilmer] registered."¹⁰ The "NYSE Rule 347 provides for arbitration of any controversy between a registered representative and any member . . . arising out of the employment or termination of employment of such registered representative."¹¹

In 1987, Interstate fired Gilmer, who was then sixty-two years old.¹² Gilmer filed an age discrimination claim with the EEOC¹³ and later brought an age discrimination suit against Interstate in the United States District

⁸ See *id.* at 23.

⁹ See *id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² See *id.*

¹³ See *id.*

Court for the Western District of North Carolina, alleging that Interstate had discharged him in violation of the Age Discrimination in Employment Act (ADEA).¹⁴ Interstate sought to compel arbitration of the ADEA claim pursuant to the arbitration agreement in Gilmer's registration application.¹⁵ The District Court denied Interstate's motion, citing the Supreme Court decision *Alexander v. Gardner-Denver Co.*¹⁶ in support of its conclusion that ADEA claimants should be protected from waiver of a judicial forum.¹⁷ The United States Court of Appeals for the Fourth Circuit reversed, and the Supreme Court granted certiorari.¹⁸

Justice White, writing for the majority, affirmed the Fourth Circuit and held that Gilmer's ADEA claim was arbitrable.¹⁹ Relying on the mandate of the Federal Arbitration Act (FAA)²⁰ and recent Court decisions favoring arbitration, the Court held that all statutory claims are appropriate for arbitration "unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."²¹ The Congressional intention to preclude arbitration may be found in the text of the statute, the legislative history or in an "inherent conflict" between arbitration and the statute's purposes.²² The Court found, and Gilmer conceded, that nothing in the text or legislative history of the ADEA precludes arbitration.²³

In addition, the Court did not accept Gilmer's arguments that mandatory arbitration of ADEA claims would be inconsistent with the purpose of the ADEA.²⁴ First, Gilmer argued that Congress designed the ADEA to address the important social policy of preventing discrimination against aged employees²⁵ by allowing both private suits by citizens and EEOC action against employers.²⁶ Yet, if ADEA claims may be subject to compulsory arbitration on an individual basis, Gilmer reasoned, the EEOC's efforts to enforce the ADEA are undermined and justice will be

¹⁴ 29 U.S.C. §§ 621-634 (1994).

¹⁵ See *Gilmer*, 500 U.S. at 24.

¹⁶ 415 U.S. 36 (1974).

¹⁷ See *Gilmer*, 500 U.S. at 24.

¹⁸ See *id.*

¹⁹ See *id.* at 35.

²⁰ 9 U.S.C. § 1 (1994).

²¹ *Gilmer*, 500 U.S. at 26.

²² *Id.* (citations omitted).

²³ See *id.*

²⁴ See *id.* at 27.

²⁵ *Id.*

²⁶ *Id.*

served individually, but not on a wide-scale basis.²⁷ The Court rejected this argument, noting that arbitration is appropriate for claims under other federal statutes that also advance broad social goals.²⁸ Additionally, the Court held that an arbitration agreement would not prevent the EEOC from filing claims against employers under the ADEA.²⁹

Second, Gilmer argued that the arbitration of ADEA claims would deprive claimants of a judicial forum for their grievances.³⁰ Consistent with its approach favoring arbitration, the Court dismissed this concern and noted that "[i]f Congress intended the substantive protection afforded [by the ADEA] to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history."³¹

The Court disposed of Gilmer's claims that arbitration proceedings did not provide adequate procedural safeguards, holding that such attacks are "far out of step with our current strong endorsement of federal statutes favoring . . . [arbitration]."³² Gilmer raised a number of procedural concerns surrounding arbitration: the arbitration panels may be biased, discovery is more limited, the arbitrators will not issue written opinions, judicial review is too limited, arbitration will not provide for broad equitable relief such as class actions and there often will be unequal bargaining power between employers and employees under compulsory arbitration agreements.³³ The Court rejected the procedural concerns, finding that under the relevant stock exchange guidelines adequate protections are in place to address Gilmer's complaints.³⁴ The Court also was unfazed by the possible existence of unequal bargaining power, holding that mere inequality of power is not a sufficient reason to find arbitration agreements unenforceable.³⁵

The Court also refuted Gilmer's argument that the decisions in *Alexander v. Gardner-Denver Co.* and its progeny³⁶ prohibit the arbitration

²⁷ See *id.* at 27-28.

²⁸ See *id.* at 28. Other federal statutes listed by the Court where arbitration is appropriate are the Sherman Act, the Securities Exchange Act of 1934, Racketeer Influenced and Corrupt Organization (RICO) statute and the Securities Act of 1933.

²⁹ See *id.* at 28, 32.

³⁰ See *id.* at 28.

³¹ *Id.* at 29 (citing *Mitsubishi Motor Corp. v. Solar Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

³² *Id.* at 30 (quoting *Rodriguez De Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989)).

³³ See *id.* at 30-33.

³⁴ See *id.*

³⁵ See *id.* at 33.

³⁶ Cases applying and interpreting the Court's holding in *Alexander v. Gardner-Denver*,

of discrimination claims.³⁷ The Court did not overturn the *Alexander v. Gardner-Denver* line of cases, but construed them so narrowly that they have little application to mandatory arbitration in the private sector. *Gardner-Denver* held that Title VII did not foreclose a union employee from bringing a claim despite the existence of a collective bargaining common wage agreement that mandated arbitration.³⁸ *Barrantine* and *McDonald* involved similar claims, and the Court in those cases also held that collective bargaining agreements would not preclude individual statutory claims.³⁹ In holding the *Gardner-Denver* reasoning inapplicable, the Court noted that those cases did not involve *individual* agreements to arbitrate statutory claims, but instead involved the question of judicial resolution of statutory claims when there was a *collective bargaining* arbitration agreement for contract claims.⁴⁰ Additionally, the Court noted that individuals would be represented by unions in the arbitration proceedings; thus, tension may arise between collective representation and individual rights.⁴¹ Finally, the Court noted that the cases were not brought under the FAA, with its broad policy favoring arbitration agreements.⁴²

The *Gilmer* Court did not address the question whether the FAA Section 1 exclusion⁴³ applies to *all* contracts of employment or only those contracts involving employees engaged in interstate or foreign commerce.⁴⁴ *Gilmer's* contract with the securities exchanges, not his employment agreement with Interstate, contained the arbitration clause; thus, the Court did not reach the issue.⁴⁵ As a result, the FAA's Section 1 exclusion is debated in the lower federal courts, some of which allow the FAA exclusion to preclude arbitration agreements in all employment contexts and the majority of which interpret the exclusion narrowly, allowing arbitration agreements in most employment contracts to be governed under the FAA.⁴⁶

415 U.S. 36 (1974), include *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981) and *McDonald v. West Branch*, 466 U.S. 284 (1984).

³⁷ See *Gilmer*, 500 U.S. at 33.

³⁸ See *id.* at 34.

³⁹ See *id.* at 35.

⁴⁰ See *id.*

⁴¹ See *id.*

⁴² See *id.*

⁴³ Section 1 of the FAA provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (1988 & Supp. 1995).

⁴⁴ See *Gilmer*, 500 U.S. at 25 n.2.

⁴⁵ See *id.*

⁴⁶ The First, Second, Third, Sixth and Seventh Circuits have all held that the FAA § 1 exclusion is limited to workers employed in the transportation industry. See, e.g., *Asplundh*

Only two voices, Justices Stevens and Marshall, dissented in *Gilmer*. The dissenters felt that the Court was remiss in not addressing the scope of the FAA Section 1 exclusion.⁴⁷ They would have broadly construed the exclusion to encompass all contracts of employment arising out of the employment relationship.⁴⁸ Justice Stevens found that such an interpretation was consistent with the policies and legislative history of the FAA.⁴⁹ Under the dissent's reading of the FAA, *Gilmer's* application with the securities exchange would be arising under the employment relationship with his employer, Interstate, and thus would be excluded from coverage under the FAA.⁵⁰ Further, Justice Stevens argued that *Gilmer* should not have to arbitrate his claims under the ADEA because arbitration conflicted with the social policies under the statute.⁵¹ Because commercial arbitration is usually limited to a specific dispute between individual parties and the available arbitral remedies do not provide for class-wide injunctive relief, an "essential purpose of the ADEA is frustrated by compulsory arbitration of employment discrimination claims."⁵²

The *Gilmer* decision heralded the beginning of mandatory arbitration of civil rights employment claims in the nonunion sector. Employers now had the Supreme Court's stamp of approval when including pre-dispute arbitration clauses in their own contracts or in contracts of related

Tree Expert Co. v. Bates, 71 F.3d 592, 596-602 (6th Cir. 1995) (rejecting earlier decision in *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305 (6th Cir. 1991) and interpreting legislative history of FAA to apply the exclusion only to seamen and railroad workers); *Hull v. NCR Corp.*, 826 F. Supp. 303, 305-307 (E.D. Mo. 1993) (listing Circuits narrowly construing § 1 exclusion). See also *Crawford v. West Jersey Health Sys.*, 847 F. Supp. 1232, 1240-1241 (D.N.J. 1994) (holding that doctor's contract with her employer affected commerce, but that it was not an employment contract excluded under the FAA). Only a handful of courts interpret the exclusion clause to exclude *all* contracts of employment. See, e.g., *United Elec. Radio & Mach. Workers v. Miller Metal Prods.*, 215 F.2d 221, 224 (4th Cir. 1954) (holding that FAA does not apply to collective bargaining agreements because they were employment contracts and stating in dicta that it would apply the same rule to *all* employment contracts); *Arce v. Cotton Club of Greenville, Inc.*, 883 F. Supp. 117 (N.D. Miss. 1995) (holding that an arbitration clause that is part of an employment agreement is excluded from the enforcement power of the FAA and the exclusion clause of 9 U.S.C. § 9 (1994) does not apply to only that class of employees actually engaged in the movement of goods in foreign or interstate commerce).

⁴⁷ See *Gilmer*, 500 U.S. at 40 (Stevens, J., dissenting).

⁴⁸ See *id.*

⁴⁹ See *id.* at 39-40.

⁵⁰ See *id.* at 40.

⁵¹ See *id.* at 41-42.

⁵² *Id.*

industries, such as the securities application at issue in *Gilmer*. The decision is notable for its wide embrace of arbitration of employment claims, including those involving the civil rights of its claimants.

III. AFTER *GILMER*: RESPONSE OF THE FEDERAL COURTS

A. Which Civil Rights Claims May Be Arbitrated

The federal courts, on cue from *Gilmer*, have upheld the use of mandatory arbitration for a wide range of federal civil rights claims. Courts have held arbitrable employee claims under Title VII,⁵³ the Americans with Disabilities Act (ADA),⁵⁴ the ADEA,⁵⁵ the Older Workers' Benefits Protection Act (OWBPA),⁵⁶ the Employee Retirement and Investment

⁵³ See, e.g., *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299 (9th Cir. 1994), *cert. denied*, 116 S. Ct. 61 (1995); *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482 (10th Cir. 1994); *Nghiem v. NEC Elec., Inc.*, 25 F.3d 1437 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 638 (1994); *Bender v. A.G. Edwards & Sons*, 971 F.2d 698 (11th Cir. 1992); *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932 (9th Cir. 1992); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305 (6th Cir. 1991); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229 (5th Cir. 1991); *Cherry v. Wertheim Schroder & Co.*, 868 F. Supp. 830 (D. S.C. 1994); *Crawford v. West Jersey Health Sys.*, 847 F. Supp. 1232 (D.N.J. 1994); *Williams v. Katten Muchin & Zavis*, 837 F. Supp. 1430 (N.D. Ill. 1993); *Hull v. NCR Corp.*, 826 F. Supp. 303 (E.D. Mo. 1993).

⁵⁴ See, e.g., *Golenia v. Bob Baker Toyota*, 915 F. Supp. 201 (S.D. Cal. 1996) (holding that employee's ADA claim was arbitrable); *Solomon v. Duke Univ.*, 850 F. Supp. 372 (M.D.N.C. 1993) (indicating in dicta that ADA claims would be arbitrable); see also *Austin v. Owens-Brockway Glass Container, Inc.*, 844 F. Supp. 1103 (W.D. Va. 1994) (upholding arbitration of union employee ADA claim and applying *Gilmer* reasoning). But see *McGinnis v. Wonder Chem. Co.*, No. Civ.A. 95-4384, 1995 WL 756590 (E.D. Pa. Dec. 21, 1995) (rejecting in dicta arbitration of ADA claim); *DiPuccio v. United Parcel Serv.*, 890 F. Supp. 688 (N.D. Ohio 1995) (rejecting arbitration of union employee ADA claim and applying labor law precedent); *Riley v. Weyerhaeuser Paper Co.*, 898 F. Supp. 324 (W.D. N.C. 1995) (rejecting arbitration of union employee ADA claim but applying *Gilmer* reasoning); *Schmidt v. Safeway, Inc.*, 864 F. Supp. 991 (D. Or. 1994) (rejecting arbitration of union employee ADA claim); *Block v. Art Iron, Inc.*, 866 F. Supp. 380 (N.D. Ind. 1994) (same).

⁵⁵ See generally *Gilmer*, 500 U.S. 20; *Crawford*, 847 F. Supp. 1232; *Williams v. Cigna Fin. Advisors*, 56 F.3d 656 (5th Cir. 1995).

⁵⁶ In 1990, the Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978 (1990) amended the ADEA at 29 U.S.C. §§ 621, 623, 626 and 640. The United States District Court for the Northern District of Illinois in *Williams v. Katten Muchin & Zavis*, 837 F. Supp. 1430 (N.D. Ill. 1993), held that OWBPA claims as well as ADEA claims were arbitrable.

Security Act (ERISA),⁵⁷ the Civil Rights Act of 1991,⁵⁸ the Employee Polygraph Protection Act⁵⁹ and the Protection of Jurors' Employment Act ("Jurors' Act").⁶⁰ The federal courts seemingly have accepted the use of mandatory arbitration for virtually all private sector employment rights claims that have come before them; few federal court cases have prohibited arbitration for a civil rights claim in the nonunion sector.

The widespread acceptance of arbitration for civil rights claims in the years since *Gilmer* may be one of the catalysts for the growing criticisms from certain employment community actors who see no end to the reach of mandatory arbitration clauses in the civil rights arena. The federal courts, with few exceptions, are not concerned with potential drawbacks to the use of mandatory arbitration for civil rights claims. Only in a few recent decisions have the federal courts shown any interest in curtailing their endorsement of pre-dispute arbitration.

B. Distrust of *Gilmer*? Recent Cautionary Decisions

Despite the widespread federal court embrace of mandatory arbitration for civil rights claims, recently the Supreme Court and the Ninth Circuit have shown some caution in their blanket endorsement of mandatory arbitration clauses. In *Mastrobuono v. Shearson Lehman Hutton, Inc.*,⁶¹ the Supreme Court upheld an arbitration decision involving a securities claim that awarded punitive damages to the plaintiff and struck down a choice-of-law provision in the arbitration contract that would have prevented the punitive damage award.⁶² The decision was a blow to businesses who employ the tactic of including a New York choice-of-law provision in the contract boilerplate. Under New York law, punitive damages are not awardable in arbitrations. The Court's decision, however, rested mainly on the ambiguous wording in the contract, and the Court did not frown directly

⁵⁷ See, e.g., *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110 (3d Cir. 1993); *Bird v. Shearson Lehman/American Express, Inc.*, 926 F.2d 116 (2d Cir.), cert. denied, 501 U.S. 1251 (1991); *Bevere v. Oppenheimer & Co.*, 862 F. Supp. 1243 (D.N.J. 1994).

⁵⁸ See, e.g., *Nghiem v. NEC Elec., Inc.*, 25 F.3d 1437 (9th Cir. 1994).

⁵⁹ 9 U.S.C. §§ 2001-2009 (1994). See, e.g., *Saari v. Smith, Barney, Harris Upham & Co.*, 968 F.2d 877 (9th Cir.), cert. denied, 506 U.S. 986 (1992).

⁶⁰ 28 U.S.C. § 1875 (1994). See, e.g., *McNulty v. Prudential-Bache Sec. Inc.*, 871 F. Supp. 567 (E.D.N.Y. 1994).

⁶¹ 115 S. Ct. 1212 (1995). For a brief discussion of this case, see Henry G. Appel, *Recent Development*, 12 OHIO ST. J. ON DISP. RESOL. 233 (1996).

⁶² See *id.*

upon the security industry's practice of precluding punitive damages.⁶³ Yet the decision may indicate that the Court felt that the contracting stage of mandatory arbitration had gone awry and unduly favored the employer. Whereas in *Gilmer* the Court was unconcerned with the potential for unequal bargaining power,⁶⁴ *Mastrobuono* hints that the Court now may be more concerned with the balance of power between employers and employees in the drafting and signing of pre-dispute arbitration clauses.

The Ninth Circuit also has exhibited concern for the contracting stage of the mandatory arbitration process. In *Prudential Insurance Co. v. Lai*,⁶⁵ the court reversed a district court order compelling arbitration in a Title VII action. The court held that a Title VII plaintiff may be forced to forego statutory remedies and arbitrate her claim only if she has *knowingly* agreed to submit to arbitration.⁶⁶ In *Lai*, the court found that the plaintiff-appellants could not have understood they were agreeing to arbitrate sexual discrimination suits because the securities application form they signed did not specify the types of suits to be arbitrated.⁶⁷

The plaintiff-appellants, Justine Lai and Elvira Viernes, were required to sign a U-4 form when applying for their positions as sales representatives for the Prudential Insurance Company of America.⁶⁸ The fifth item on page 4 of the form provided: "I agree to arbitrate any dispute, claim or controversy that may arise between me or my firm . . . that is *required to be arbitrated under the rules, constitutions or bylaws of the organizations with which I register.*"⁶⁹ The disputes which must be arbitrated were found in the cross-referenced rules of the National Association of Securities Dealers (NASD), the securities organization Lai and Viernes joined. The NASD manual's arbitration requirements, in turn, provided: "Any dispute, claim, or controversy . . . between or among members . . . arising in connection with the business of such member(s) . . . shall be arbitrated."⁷⁰ The Ninth Circuit found that the plaintiff-appellants could not have understood that they were agreeing to arbitrate sexual discrimination suits when they signed the U-4 form because neither that form nor the NASD manual referred to employment disputes.⁷¹

⁶³ See *id.* at 1216.

⁶⁴ See *Gilmer*, 500 U.S. at 33.

⁶⁵ 42 F.3d 1299 (9th Cir. 1994).

⁶⁶ See *id.*

⁶⁷ See *id.* at 1305.

⁶⁸ See *id.* at 1301.

⁶⁹ *Id.* at 1302 (emphasis added).

⁷⁰ See *id.* at 1301-1302 (quoting NASD MANUAL, CODE OF ARBITRATION PROCEDURE ¶ 3708).

⁷¹ *Id.* at 1305.

The *Lai* decision indicates that the Ninth Circuit is concerned with notice of waiving statutory rights at the contracting stage. According to the court, appropriate notice would require explicit contractual notice that employees were waiving their rights to a judicial forum for employment disputes.⁷²

Although it may be too early to tell what impact, if any, *Mastrobuono* and *Lai* will have, the decisions may indicate a shift in the federal court thinking regarding the contracting stage of pre-dispute arbitration clauses. Significantly, these cases mark the first time since *Gilmer* that a federal court has struck down an arbitration agreement in the private nonunion sector because of issues surrounding the mandatory arbitration contract itself.⁷³

C. Federal Court Review of Arbitration Decisions Involving Civil Rights Claims

Except for the decisions in *Mastrobuono* and *Lai*, the federal courts have not been willing to address any of the inequalities or problems inherent in mandatory arbitration in nonunion civil rights claims as they exist at either the contracting or procedural stages of mandatory arbitration. The courts, but for a single instance, also have not used their powers of review to correct inequitable arbitration awards involving civil rights claims.⁷⁴

The limited scope of authority federal courts have for reviewing arbitral awards may account for the dearth of cases where courts have reviewed such cases. The limited scope of authority federal courts have for reviewing arbitral awards. Congress has limited the grounds upon which an arbitral award can be vacated. A court only may vacate an award (1) where the award was procured by corruption, fraud or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the

⁷² See *id.*

⁷³ In a more recent non-employment case, the Ninth Circuit again expressed concern over the proper notice at the contracting stage of mandatory arbitration. In *Graham Oil v. ARCO Products*, 43 F.3d 1244 (9th Cir.), *cert. denied*, 116 S. Ct. 275 (1995), the court held that an arbitration agreement in a commercial suit involving the purported waiver of statutory rights under the Petroleum Marketing Practices Act (PMPA) was an unenforceable contract of adhesion. Although *Graham Oil* did not involve civil rights of employees, it does suggest a trend in the Ninth Circuit of providing greater protection of "notice" when signing pre-dispute arbitration agreements. *But cf. Golenia v. Bob Baker Toyota*, 915 F. Supp. 201 (S.D. Cal. 1996) (holding that an "adhesion contract" objection to an arbitration clause in an employment contract was inconsistent with the strong federal policy favoring arbitration).

⁷⁴ See generally *Mastrobuono*, 115 S. Ct. 1212.

hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy or of any other misbehavior by which the rights of the parties have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.⁷⁵ Federal precedent also echoes the policy of limited judicial review of arbitral awards.⁷⁶

The limited scope of judicial review constrains the federal courts in their efforts to police inequitable arbitral awards involving civil rights claims, but the power of review still remains as a potential weapon against egregious violations of arbitral power. At present, however, this potential weapon lies dormant in the federal court arsenal. To date, a federal court has reviewed for procedural fairness issues an arbitration decision involving a nonunion civil rights claim only once,⁷⁷ in *Olson v. Merrill Lynch, Pierce, Fenner & Smith*.⁷⁸

The Eighth Circuit in *Olson* struck down the arbitration decision because of partiality of the arbitrators.⁷⁹ In *Olson*, an employee sued his employer for age discrimination and a panel of three arbitrators rendered a decision in favor of the employer.⁸⁰ Olson moved to vacate the decision under 9 U.S.C. Section 10(a)(2),⁸¹ alleging that the arbitrators were not impartial because two of the arbitrators had failed to disclose ongoing business relationships with the defendant-employer.⁸² The district court denied the motion and confirmed the arbitration.⁸³ The Eighth Circuit reversed, holding that one arbitrator's failure to disclose his high ranking position with a corporation that had a close business relationship with the

⁷⁵ See 9 U.S.C. § 10(a) (1994).

⁷⁶ See, e.g., *Remmey v. Paine Webber, Inc.*, 32 F.3d 143 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 903 (1995).

⁷⁷ The federal courts have reviewed other arbitration decisions involving civil rights claims, but these cases were not reviewed for procedural fairness of the arbitration under 9 U.S.C. § 10(a). See generally *Nghiem*, 25 F.3d at 1437 (upholding an arbitration award involving a Title VII claim because plaintiff's voluntary initiation of arbitration constituted waiver of objection of authority of arbitrator); *Solomon v. Duke Univ.*, 850 F. Supp. 372 (M.D.N.C. 1993) (upholding an arbitration award involving ADA claim because plaintiff had not timely filed a motion to vacate the award).

⁷⁸ 51 F.3d 157 (8th Cir. 1995).

⁷⁹ See *id.* at 157.

⁸⁰ See *id.* at 158.

⁸¹ Under 9 U.S.C. § 10(a)(2) (1994), a court may vacate an arbitration award if "there was evident partiality . . . in the arbitrators."

⁸² See *Olson*, 51 F.3d at 158.

⁸³ See *id.*

defendant, Merrill Lynch, required the vacation of the arbitration award.⁸⁴

The Eighth Circuit's single reversal of the arbitration award involving a civil rights claim does not by itself provide enough of a pattern to draw any conclusion regarding a federal court trend in reviewing arbitrated civil rights claims. It may be significant to note, however, that in other *non-civil rights* federal court decisions involving alleged arbitrator partiality, the courts denied motions to vacate arbitration awards.⁸⁵ In *Flume* and *Johnston Lemon*, the courts seemed less concerned with the same type of arbitrator partiality that was worthy of reversal in *Olson*. In *Flume*, one of the arbitrators had a business relationship with one of the arbitral parties, the defendant-stockbroker.⁸⁶ Five or six years before the arbitration, the arbitrator had purchased stock through the broker.⁸⁷ The United States District Court for the Eastern District of Wisconsin, however, held that the arbitrator's business dealings were insufficiently "intimate" to show partiality.⁸⁸ Similarly, in *Johnston Lemon*, one of the arbitrators failed to disclose a significant past adversarial relationship between his former employer and the defendant-broker.⁸⁹ Although the arbitrator had retired from the company by the time the dispute arose between his former employer and the defendant-broker, the plaintiffs had no notice of that fact because the arbitrator belatedly had filed the National Association of Securities Dealers form.⁹⁰ Nevertheless, the United States District Court for the District of Columbia held that this was not evidence of arbitrator partiality because the broker, who was appealing the case, ostensibly had notice of the arbitrator's relationship with his former employer from the available forms filed by the arbitrator and, thus, should have objected

⁸⁴ See *id.*

⁸⁵ See, e.g., *Remmey v. Paine Webber, Inc.*, 32 F.3d 143 (4th Cir. 1994) (affirming arbitration award and rejecting claims of bias of arbitrators, manifest disregard of the law and violation of public policy), cert. denied, 115 S. Ct. 903 (1995); *Hayne, Miller & Farni, Inc. v. Flume*, 888 F. Supp. 949 (E.D. Wis. 1995) (denying motion to vacate arbitration award based on arbitrators' prejudice, exceeding their authority and arbitration not supported by evidence); *Johnston Lemon & Co. v. Smith*, 886 F. Supp. 54 (D.D.C. 1995) (denying motion to vacate arbitration award based on claims of arbitrators exceeding their powers, manifestly disregarding the law and bias); *Smith v. Prudential Sec., Inc.*, 846 F. Supp. 978 (M.D. Fla. 1994) (denying motion to vacate arbitration award based on claims of arbitrators' partiality, misconduct and imperfectly executing powers).

⁸⁶ See *Flume*, 888 F. Supp. at 958-959.

⁸⁷ See *id.*

⁸⁸ See *id.*

⁸⁹ See *Johnston Lemon*, 886 F. Supp. at 56.

⁹⁰ See *id.*

earlier.⁹¹

The fact that the *Olson* court reversed for arbitrator partiality and two federal courts faced with similar, albeit *non-civil rights*, circumstances did not vacate the arbitration award may not be significant; indeed, the *Olson* court did not indicate that its decision was colored by the type of claim brought by the plaintiff. The Eighth Circuit's decision in *Olson*, however, may indicate that federal courts in the future will more carefully scrutinize arbitration awards when they involve civil rights claims.

IV. AFTER *GILMER*: THE LEGISLATIVE RESPONSE

A. *Legislative Histories Discouraging Mandatory Arbitration and Relevant Case Law*

1. *Americans with Disabilities Act of 1990*

The *Gilmer* Court held that statutory claims may be arbitrated unless Congress intended, through the legislative history or in the text of the statute itself, that certain rights may not be precluded from judicial adjudication.⁹² Two recent federal statutes—the ADA and the 1991 Civil Rights Act—contain language in their respective legislative histories that would seem to preclude mandatory arbitration.

The legislative history of the ADA indicates that nonvoluntary arbitration is not a desirable means of enforcing rights under the Act. A 1990 House Conference Report states:

It is the intent of the conferees that the use of [these] alternative dispute resolution procedures is *completely voluntary*. Under no condition would an arbitration clause in a collective bargaining agreement or employment contract prevent an individual from pursuing *their* rights under the ADA.⁹³

A Committee Print prepared for the House Committee on Education and Labor echoes the same sentiments regarding mandatory arbitration:

⁹¹ See *id.*

⁹² See *Gilmer*, 500 U.S. at 26.

⁹³ H.R. CONF. REP. NO. 101-596, 101ST CONG. (1990), reprinted in 1990 U.S.C.C.A.N. 565, 598 (emphasis added).

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The Committee wishes to emphasize . . . that the use of alternative dispute resolution mechanisms is intended to *supplement*, not *supplant*, the remedies provided by this Act. Thus, for example, the Committee believes that any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or *in an employment contract* does not preclude the affected person from seeking relief under the enforcement provisions of the Act The Committee believes that the approach articulated by the Supreme Court in *Alexander v. Gardner-Denver Co.* applies equally to the ADA and does not intend that [this section] be used to preclude rights and remedies otherwise available to persons with disabilities.⁹⁴

The legislative history of the ADA apparently mandates that any agreement to arbitrate disputes under the ADA must be voluntary and should not preclude a claimant's rights to a judicial forum. By definition, mandatory arbitration is a pre-dispute agreement that would preclude the claimant from seeking relief in court and may not be voluntary because the contract is signed in advance of any dispute under the ADA. Congress, then, arguably intended in the legislative history to preclude mandatory arbitration for claims brought under the ADA.

At least two federal courts faced with nonunion ADA claims, however, have eschewed the legislative history of the ADA and held that ADA claims may be submitted to arbitration under a pre-dispute arbitration agreement. In *Solomon v. Duke University*,⁹⁵ the United States District Court for the Middle District of North Carolina confirmed an arbitration award against a plaintiff alleging ADA violations. The court did not discuss in detail its analysis regarding Ms. Solomon's ADA claim because she did not bring a timely challenge to the arbitration under the FAA.⁹⁶ The court, however, stated in dicta that Ms. Solomon's argument that the arbitrator could not hear her ADA claim was "without merit."⁹⁷ The *Solomon* court apparently would have allowed the arbitrators to hear Ms. Solomon's ADA claim despite the legislative history discouraging pre-dispute arbitration for such claims.

A more recent district court case, however, is more troublesome in light of the ADA's legislative history discouraging nonvoluntary arbitration

⁹⁴ HOUSE COMM. ON EDUCATION AND LABOR, 101ST CONG., LEGISLATIVE HISTORY OF PUBLIC LAW 101-336, THE AMERICANS WITH DISABILITIES ACT 516-517 (Comm. Print 1990) (emphasis added).

⁹⁵ 850 F. Supp. 372 (M.D.N.C. 1993).

⁹⁶ See *id.* at 373.

⁹⁷ *Id.*

because it allows arbitration of ADA claims based on the *text* of the ADA without considering the *legislative history* in forming the statute. In *Golenia v. Bob Baker Toyota*,⁹⁸ Judge Jones of the United States District Court for the Southern District of California held that the plaintiff's ADA claim was arbitrable because the text of the ADA "betrays no indication of special hostility to arbitration" and even encourages arbitration.⁹⁹ The court did not follow the *Gilmer* Court suggestion to consider *both* the text and legislative history of the statutes and relied solely on the text to inform its decision. The court then compared ADA claims with claims brought under Title VII and found that because the statutes were similar in aim and substantive provisions, and because Title VII claims were arbitrable in the Ninth Circuit, ADA claims similarly were arbitrable.¹⁰⁰

At the present time, the *Solomon* and *Golenia* courts are the only federal courts that have addressed the issue of arbitration of ADA claims in the *nonunion* sector. Although it remains to be seen how subsequent federal courts will treat such claims in the same context, the burgeoning trend is disturbing. The *Solomon* court addressed the issue in dicta and without discussion of the ADA legislative history. Similarly, the *Golenia* court ignored the ADA's legislative history and looked only to the ADA's literal text. Apparently the Congressional effort to discourage nonvoluntary arbitration by preserving such sentiment in the public record accompanying the statute is failing to persuade the federal courts, at least in the ADA context.

There is more case law in the federal courts regarding ADA claims brought by *union* employees faced with a collective bargaining agreement (CBA), yet in those cases the federal courts seem to be struggling to interpret *Gilmer* and the relevance of the ADA's legislative history. Although this Article focuses on *nonunion private employee civil rights*, a brief overview of case law involving arbitration of ADA civil rights claims of *union* employees will be helpful to illustrate the disarray and confusion in the federal courts after *Gilmer*.

A number of recent federal cases have held that ADA claims brought by union employees faced with a collective bargaining agreement mandating arbitration of employee claims are *precluded* from arbitration and may proceed through the judicial process.¹⁰¹ The courts in all of these cases

⁹⁸ 915 F. Supp. 201 (S.D. Cal. 1996).

⁹⁹ See *id.* at 205.

¹⁰⁰ *Id.*

¹⁰¹ See, e.g., *McGinnis v. Wonder Chem. Co.*, No. Civ.A. 95-4384, 1995 WL 756590 (E.D. Pa. Dec. 21, 1995); *DiPuccio v. United Parcel Serv.*, 890 F. Supp. 688 (N.D. Ohio 1995); *Schmidt v. Safeway, Inc.*, 864 F. Supp. 991 (D. Or. 1994); *Block v. Art Iron, Inc.*, 866 F. Supp. 380 (N.D. Ind. 1994).

relied on the collective labor line of cases beginning with *Alexander v. Gardner-Denver*¹⁰² instead of the *Gilmer* reasoning to preclude arbitration of the ADA claims. The courts specifically distinguished the *Gilmer* precedent from the collective bargaining precedents:

Gilmer and the other cases . . . are distinguishable. In *Gilmer*, the Supreme Court distinguished the plaintiff's contract, a New York Stock Exchange Registration Application, from collective bargaining agreements in which parties had not specifically agreed to arbitrate their statutory claims. It was significant to the Court that the circumstances of *Gilmer* did not involve any tension between collective representation and individual statutory rights.¹⁰³

There is nothing in *Gilmer* to suggest that the [Supreme] [C]ourt abandoned or even reconsidered its efforts to protect individual statutory rights from the give-and-take of the collective bargaining process. It is true, of course, that *Gilmer* permits employees individually to enter contracts under which they agree to submit statutory claims to arbitration. . . . But the court went out of its way in *Gilmer* to contrast its holding in that case with its holdings in *Gardner-Denver*, *Barrentine*, and *McDonald* Consequently, *Gilmer* does not alter or undermine the protection established in *Gardner-Denver* against waiver of individual statutory rights through collective bargaining agreements.¹⁰⁴

Thus, in the majority of cases where the federal courts have prevented arbitration of union employees' ADA claims, the courts have relied on the *Gardner-Denver* line of cases rather than the *Gilmer* reasoning.

Two cases involving union employees' ADA claims, however, do not rely on the *Gardner-Denver* reasoning but instead rely on the *Gilmer* rationale. Although the cases both apply *Gilmer* to the issue, they reach different conclusions. In *Austin v. Owens-Brockway Glass Container, Inc.*,¹⁰⁵ the United States District Court for the Western District of Virginia held that claims under the ADA are subject to mandatory arbitration. The *Austin* court granted summary judgment to the defendant-employer because the union employee did not arbitrate her claims.¹⁰⁶ The court did not discuss the rationale behind its decision, but simply held that "because plaintiff's [ADA] complaint was subject to mandatory arbitration, the *Gilmer* line of

¹⁰² 415 U.S. 36 (1974).

¹⁰³ *DiPuccio*, 890 F. Supp. at 692.

¹⁰⁴ *Block*, 866 F. Supp. at 386 (citations omitted).

¹⁰⁵ 844 F. Supp. 1103 (W.D. Va. 1994).

¹⁰⁶ *See id.* at 1106.

cases applies here."¹⁰⁷ The court's simple statement without more has led other courts to criticize the *Austin* court's reasoning.¹⁰⁸

In contrast, in *Riley v. Weyerhaeuser Paper Co.*,¹⁰⁹ the court applied the *Gilmer* reasoning but came to the opposite result: ADA claims may *not* be arbitrated. The *Riley* court looked to the legislative history of the ADA, as it interpreted *Gilmer* to require, and determined that it was "unequivocal in expressing Congress' intent to preclude a waiver of judicial remedies."¹¹⁰ Thus, the court found that the claimant could pursue judicial remedies for his ADA claim.

As the preceding discussion makes clear, there are inconsistencies among the federal courts in their application of *Gilmer* to cases involving the arbitration of union employees' statutory rights. The most correct interpretation of *Gilmer* would be to preclude union cases involving collective bargaining agreements from applying a *Gilmer*-type analysis. As *DiPuccio* and *Block* assert, the *Gilmer* Court did not intend for its analysis in *Gilmer* to apply to collective bargaining agreements. Instead, it distinguished the *Gardner-Denver* line of cases from the case at bar. Thus, cases involving ADA claims in the union sector should rely on *Gardner-Denver*, which is still good law, and should allow statutory civil rights claims to proceed in a judicial forum.

Similarly, the most correct approach for courts facing cases involving ADA claims in the *private* sector would be to examine the ADA's legislative history, which precludes nonvoluntary arbitration, and not allow mandatory arbitration of ADA claims. Although the only two federal courts considering nonunion ADA cases did not take such an approach, other federal courts should reject the cursory analysis of *Solomon* and *Golenia* and adhere to the legislative history of the ADA, which clearly rejects nonvoluntary arbitration.

2. The Civil Rights Act of 1991

Just as the ADA's legislative history precludes mandatory arbitration, the Civil Rights Act of 1991's legislative history similarly discourages mandatory arbitration and directly rejects the application of the *Gilmer* reasoning. In remarks to the Senate in October of 1991, Senator Dole stated

¹⁰⁷ *Id.* at 1107.

¹⁰⁸ *See, e.g., DiPuccio*, 890 F. Supp. at 692 (stating that the *Austin* court failed to discuss the distinction between the collective representation and individual statutory rights); *Block*, 866 F. Supp. at 385 (stating that the *Austin* court was in conflict with clear and controlling Supreme Court precedent in *Gilmer*).

¹⁰⁹ 898 F. Supp. 324 (W.D.N.C. 1995).

¹¹⁰ *Id.* at 326.

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that this provision of the Civil Rights Act of 1991 “encourages the use of alternative means of dispute resolution, including binding arbitration, where the parties *knowingly and voluntarily elect to use these methods*.”¹¹¹

In November of 1991, Senator Edwards addressed the House on the dispute resolution of Civil Rights Act of 1991 claims, remarking:

[The ADR provision of the Act] is intended to supplement, not supplant, remedies provided by Title VII, and is not to be used to preclude rights and remedies that would otherwise be available. This section is intended to be consistent with decisions such as *Alexander v. Gardner-Denver Co.* which protect employees from being required to agree in advance to arbitrate disputes under Title VII and to refrain from exercising their right to seek relief under Title VII itself. This section contemplates the use of *voluntary arbitration* to resolve specific disputes after they have arisen, not coercive attempts to force employees in advance to forego statutory rights. *No approval whatsoever is intended of the Supreme Court’s recent decision in Gilbert (sic) v. Interstate Johnson Lane Corp. or any application or extensions of it to Title VII.*¹¹²

A House Conference Report to the Judiciary Committee on the Civil Rights Act of 1991 includes language similar to Senator Edwards’ statements on the House floor.¹¹³ The Committee emphasized that any agreement to submit disputes to arbitration does not preclude the party from seeking relief under the Act’s enforcement provisions.¹¹⁴

The legislative history of the 1991 Act seems unequivocal: Mandatory pre-dispute arbitration is not permitted for enforcing the statute’s protections. The Ninth Circuit’s handling of two cases involving Title VII claims brought under the 1991 amendments, however, illustrates both the effectiveness of the legislative language discouraging mandatory arbitration and the hesitancy of the Ninth Circuit in interpreting that legislative language. In the first case, *Nghiem v. NEC Elec., Inc.*, the Ninth Circuit *upheld* the arbitration of Title VII claims because the plaintiff had not raised legislative history arguments but had relied instead on a weak textual argument to which the court did not give credence.¹¹⁵ Later that same year,

¹¹¹ 137 CONG. REC. S15472, S15478 (daily ed. Oct. 30, 1991) (statement of Sen. Dole) (emphasis added).

¹¹² 137 CONG. REC. H9505, H9530 (daily ed. Nov. 7, 1991) (statement of Sen. Edwards) (emphasis added).

¹¹³ See H.R. CONF. REP. NO. 102-40 pt. 2, at 41 (1991).

¹¹⁴ *Id.*

¹¹⁵ *Nghiem*, 25 F.3d at 1441.

however, the Ninth Circuit decided *Prudential Insurance Co. v. Lai*.¹¹⁶ In that case, the court expressly interpreted the legislative history of the 1991 Act to *prevent* arbitration of Title VII claims unless the plaintiffs knowingly and voluntarily signed arbitration agreements.¹¹⁷

In *Nghiem*, the plaintiff, Peter Nghiem, contested the validity of an arbitration decision rendered against him. Regarding his Title VII claim, Nghiem argued that his employment discrimination claim must be adjudicated in federal court because although the *Gilmer* decision anticipated that Title VII claims would be arbitrable, the 1991 amendments to Title VII provide for a jury trial and thus necessarily preclude arbitration of such claims.¹¹⁸ Nghiem did not rely in his argument on the relevant legislative history of Title VII or the 1991 Act. Instead, Nghiem relied solely on the *text* of the 1991 amendments presumably to make the argument of exclusion: If the text provides for a jury trial, then it excludes arbitration that prevents a judicial forum.¹¹⁹

The Ninth Circuit, led by Judge O'Scannlain, rejected Nghiem's argument, stating simply:

[E]stablishing a right to jury trial for Title VII claims does not evince a congressional intent to preclude arbitration; it merely defines those procedures which are available to plaintiffs who pursue the federal option, as opposed to arbitration.¹²⁰

Nghiem indicates the Ninth Circuit's initial hesitancy to apply the legislative history of the 1991 Act, at least if the plaintiff does not raise such an argument. Indeed, the court acknowledged that the test of whether a statutory claim may be arbitrated is one of "congressional intent," but noted that Nghiem did not argue that Congress "*intended* to exclude Title VII claims from arbitration."¹²¹ Those cryptic words suggest that if Nghiem had made a legislative intent argument, the Ninth Circuit may have considered it.

Although the Ninth Circuit in *Nghiem* avoided examination of the 1991 Act's legislative history, the court in *Lai* not only examined that history but also relied on it to hold that the plaintiff-appellant's claims were not arbitrable because they had not knowingly and voluntarily signed an

¹¹⁶ 42 F.3d 1299 (9th Cir. 1994).

¹¹⁷ See *id.* at 1305.

¹¹⁸ See *Nghiem*, 25 F.3d at 1437.

¹¹⁹ See *id.*

¹²⁰ *Id.*

¹²¹ *Id.* (emphasis added).

arbitration agreement.¹²² In *Lai*, two plaintiff-appellants sought on appeal to reverse a district court order compelling them to arbitrate their Title VII claims against their employer.¹²³ The plaintiff-appellants had signed a general form requiring them to arbitrate all claims arising under their security employer's registering organization.¹²⁴ The defendant employer subsequently sought to compel arbitration of plaintiffs' sexual harassment claims. Judge Schroeder reviewed the legislative history of the 1991 Act and cited a statement by Senator Dole, who remarked that the statute encourages arbitration "only 'where the parties knowingly and voluntarily elect to use these methods.'"¹²⁵ Because the forms signed by the appellants did not describe the types of suits to be arbitrated, and did not even refer to employment disputes *per se*, the court held that the claimants need not arbitrate their claims because they had not knowingly agreed to submit their disputes to arbitration.¹²⁶ Thus, the *Lai* court made use of the 1991 Act's legislative history to denounce the employer's tactics in unilaterally enforcing arbitration of all employment claims.

In sum, the Congressional indication in the legislative history of recent civil rights statutes that the enforcement of such claims should not occur by mandatory arbitration has had mixed results as the federal courts struggle to apply *Gilmer* and interpret the history of each statute. The legislative histories of the ADA and the 1991 Civil Rights Act plainly reject mandatory, nonvoluntary arbitration. The federal courts interpreting the ADA, however, have not always acted consistently with the legislative mandate. The two federal courts that have considered *nonunion* ADA claims that were bound by mandatory arbitration agreements have indicated that they favor arbitration. Other federal courts considering *union* ADA claims have divided on whether they will apply the *Gilmer* or *Gardner-Denver* precedents and have likewise split on whether they will enforce mandatory arbitration of civil rights claims. In contrast, at least one federal court, the Ninth Circuit, has interpreted the legislative history of the 1991 Civil Rights Act to prohibit nonvoluntary arbitration of statutory claims.

B. Proposed Congressional Bills

Rather than rely on the courts' interpretations of the legislative history behind civil rights statutes, some members of Congress have proposed a more direct response to *Gilmer*'s endorsement of mandatory arbitration that

¹²² See *Lai*, 42 F.3d at 1305.

¹²³ See *id.* at 1301.

¹²⁴ See *id.*

¹²⁵ *Id.* at 1305.

¹²⁶ See *id.*

can not be as easily manipulated by the courts. Two Congressional companion bills seek to directly amend seven federal civil rights laws to provide that the protections and procedures of the laws can not be overridden by contract, other federal statutes of general applicability or by any other means.¹²⁷ The bills would still allow employees to *voluntarily* submit their discrimination claims to arbitration.

In August of 1994, Senator Feingold and Representatives Schroeder, Markey and Margolies-Mezvinsky introduced Senate Bill 2405¹²⁸ and its companion bill, House of Representatives Bill 4981. The bills are known by their common popular name, the Civil Rights Procedures Protection Act of 1994. The bills would amend Title VII of the Civil Rights Act of 1964, the ADEA, the Rehabilitation Act of 1973, the ADA, Section 1977 of the Revised Statutes, the Equal Pay Requirement under the Fair Labor Standards Act and the Family and Medical Leave Act of 1993.¹²⁹ According to the bill, each of the named civil rights statutes would be amended by adding a provision that reads:

EXCLUSIVITY OF POWERS AND PROCEDURES

Notwithstanding any Federal statute of general applicability that would modify any of the procedures expressly applicable to a claim arising under this Act, such powers and procedures shall be the *exclusive powers and procedures applicable to such right* or such claim *unless* after such right or such claim arises the claimant *voluntarily enters* into an agreement to resolve such right or such claim through arbitration or other procedure.¹³⁰

According to its authors, the proposed legislation reverses *Gilmer* and "closes a widening loophole in the enforcement of civil rights laws."¹³¹ Reports about the absence of effective remedies for sexual harassment in the securities industry and a General Accounting Office report documenting flaws in the arbitration system for securities industry employees also spurred creation of the bill.¹³² Representative Markey emphasized that the

¹²⁷ See S. 2405, 103d Cong. (1994); H.R. 4981, 103d Cong. (1994).

¹²⁸ Senator Feingold earlier had sponsored a bill with the same goals as S. 2405; the earlier short title, however, is more descriptive. The bill, S. 2012, 103d Cong. (1994), was known as the "Protection from Coercive Employment Agreements Act."

¹²⁹ See S. 2405, 103d Cong. § 1 (1994).

¹³⁰ *Id.* at § 2 (emphasis added).

¹³¹ *Discrimination: Senate Bill Bars Mandatory EEO Arbitration*, Empl. Pol. & L. Daily, August 22, 1994, available in LEXIS, BNA Library, BNA-ELD File, at d5.

¹³² *Discrimination: House Democrats Introduce Bill to Bar Compulsory Arbitration of Bias Claims*, Empl. Pol. & L. Daily, August 19, 1994, available in LEXIS, BNA Library,

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GAO found that arbitrators in the securities industry are predominantly white men who average 60 years of age and remarked that "such arbitrators are unlikely to appreciate the problems faced by women and minorities compelled to bring their discrimination claims to arbitration."¹³³

The bills have been referred to the Senate Labor and Human Resources Committee and the House Judiciary and Education and Labor Committees, respectively. However, at least one of its authors is skeptical of the bills' passage in a Republican-controlled Congress. Representative Markey commented, "Christians had a better chance against the lions than many investors and employees will have in the climate being created."¹³⁴

There have been other legislative measures discouraging mandatory arbitration as a dispute resolution mechanism. An earlier 1994 proposed bill also indicates, albeit in a more oblique fashion, that arbitration is not the preferred form of dispute resolution for civil rights claims.¹³⁵ In July of 1994 by Senator Danforth introduced Senate Bill S. 2327, commonly known as the Employment Dispute Resolution Act of 1994.¹³⁶ The bill proposes to amend Title VII, the ADA and Section 1977 of the Revised Statutes to encourage mediation of complaints filed under those statutes.¹³⁷ Significantly, the bill speaks exclusively of mediation of civil rights claims brought under those statutes and does not mention arbitration or mandatory arbitration. The absence of any mention of arbitration suggests that the bill's sponsors felt that mediation rather than arbitration was the most desirable form of ADR for civil rights claims.

In sum, the Congressional response to *Gilmer* and the rise of mandatory arbitration contracts has been to focus on the contracting stage, essentially prohibiting the use of *mandatory* arbitration contracts altogether and instead emphasizing voluntary forms of dispute resolution. While recent 1990s civil rights statutes, notably the ADA and the 1991 Civil Rights Act, discouraged mandatory arbitration in their legislative histories, more recent legislative efforts symbolize the concern of some Congressional members that many civil rights statutes do not contain language in their legislative histories discouraging arbitration and, of those that do, the implicit Congressional intent may be eschewed by the courts. Congressional members, then, seek

BNA-ELD File, at d10.

¹³³ *Id.*

¹³⁴ Margaret A. Jacobs & Michael Siconolfi, *Losing Battles*, WALL ST. J., Feb. 8, 1995, at A1.

¹³⁵ See S. 2327, 103d Cong. (1994).

¹³⁶ A companion House bill, H.R. 2016, 103d Cong. (1993), was introduced on May 6, 1993 by Representative Gunderson. The House bill was referred to the House Committees on Education and Labor and Judiciary.

¹³⁷ See S. 2327, 103d Cong. (1994).

to attack directly the rise of mandatory arbitration by amending the text of a number of civil rights statutes to prohibit mandatory arbitration.

However, in a Republican-majority Congress, efforts to directly amend civil rights statutes to prohibit arbitration contracts are unlikely to pass, and the bills probably will remain shelved in their respective committees. More realistically, federal courts will continue to apply the *Gilmer* rule of interpreting the congressional intent towards mandatory arbitration in the legislative histories of civil rights statutes. Because most of the civil rights statutes do not directly discourage mandatory arbitration in their legislative histories, it is likely that federal courts will continue to allow mandatory arbitration of such claims under *Gilmer*.

V. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: CONCERN AT THE CONTRACTING STAGE

Like Congress, the Equal Employment Opportunity Commission (EEOC) focuses its response to *Gilmer* on the contracting stage of arbitration and attempts to ensure that mandatory arbitration contracts are not created or enforced. In a policy statement issued in July of 1995, the EEOC discussed features essential to any use of ADR under EEOC auspices, including use of ADR in such programs as charge processing, litigation, federal sector equal employment opportunity complaint processing, labor-management relations and contract administration.¹³⁸ One of the core features of the EEOC's own ADR policy is *voluntariness*. In that regard, the statement reads:

ADR programs developed by the Commission will be voluntary for the parties because the unique importance of the laws against employment discrimination requires that a federal forum always be available to an aggrieved individual. The Commission believes that parties must *knowingly, willingly, and voluntarily* enter into an ADR proceeding.¹³⁹

The EEOC, then, favors only voluntary rather than mandatory arbitration as an acceptable form of ADR for use by the Commission. The EEOC holds the business community to similar standards and frowns upon the use of mandatory arbitration in private employers' internal ADR programs.¹⁴⁰ In a March 1995 Task Force Report on Dispute Resolution,

¹³⁸ Equal Employment Opportunity Commission, Notice 915.002, Alternative Dispute Resolution Policy Statement (July 17, 1995).

¹³⁹ *Id.* (emphasis added).

¹⁴⁰ Equal Employment Opportunity Commission, Report of the Task Force on

the Commission stated:

Despite our support for employer-sponsored ADR, we are concerned that some employers may attempt to require employees to engage in ADR prior to seeking the assistance of the Commission. We caution employers that internal resolution programs cannot supplant the remedies afforded by the civil rights laws. Alleged victims of employment discrimination should be able to file charges with the EEOC, regardless of the outcome of any employer-sponsored resolution program. The Commission *should reiterate its long-standing opposition to pre-employment agreements that mandate binding arbitration of employment discrimination disputes.*¹⁴¹

A recent EEOC case against a Texas business further illustrates the EEOC's distrust of private employers' mandatory arbitration policies. In *EEOC v. River Oaks Imaging and Diagnostic*,¹⁴² the EEOC sought a temporary restraining order and a preliminary injunction against a large outpatient imaging and diagnostic center, River Oaks Imaging and Diagnostic (ROID). The EEOC alleged that the business's "ADR Policy" was so misleading and against the principles of Title VII that it violated the law. The United States District Court for the Southern District of Texas granted the preliminary injunction in April of 1995.¹⁴³ The case has since been settled,¹⁴⁴ but the EEOC's arguments regarding ROID's practice of compulsory arbitration are illustrative of the EEOC's policy regarding mandatory arbitration.

The EEOC alleged that ROID's mandatory ADR policy forced employees involuntarily to relinquish their Title VII remedies because evidence indicated that ROID implemented the policy with the intent of retaliating and terminating employees who had filed discrimination charges against it.¹⁴⁵ ROID had forced all employees to "agree" to arbitrate disputes after seventeen employees had brought charges of sexual discrimination

Alternative Dispute Resolution 26 (March 1995) [hereinafter EEOC Report].

¹⁴¹ *Id.*

¹⁴² 67 Fair Empl. Prac. Cas. (BNA) 1243, 1995 WL 264003 (S.D. Tex. Apr. 19, 1995).

¹⁴³ *See id.*

¹⁴⁴ Telephone Interview with Sharona Hoffman, Senior Trial Attorney, United States Equal Employment Opportunity Commission, Houston District Office (October 20, 1995).

¹⁴⁵ Amended Memorandum of Law in Support of the Equal Employment Opportunity Commission's Application for Temporary Restraining Order and Preliminary Injunction at 2, *EEOC v. River Oaks Imaging and Diagnostic*, 67 Fair Empl. Prac. Cas. (BNA) 1243, 1995 WL 264003 (S.D. Tex. Apr. 19, 1995).

against ROID with the EEOC. Employees were forced to sign the policy without consulting with a lawyer or they were immediately discharged.¹⁴⁶ Furthermore, the EEOC alleged that ROID employees were unaware that they may lose the right to file suit premised on a Title VII claim if they utilized arbitration before filing a charge with the EEOC because ROID's ADR Policy was silent regarding the waiver of charge filing and private suit rights.¹⁴⁷ Finally, the EEOC alleged that "[c]oercive regimens such as ROID's . . . do not comport with the statutory expectations" of the 1991 Civil Rights Act.¹⁴⁸ In its Memorandum in Support of Preliminary Injunction, the EEOC reviewed the legislative history of the 1991 Civil Rights Act and concluded that Congress intended to encourage only *voluntary* alternative dispute mechanisms for claims brought under the Act.¹⁴⁹

The EEOC discourages all forms of mandatory arbitration for current or prospective employees. Critical components of any arbitration program, according to the EEOC, are the voluntary participation of both actors to the agreement as well as certain procedural safeguards that ensure the employee's voluntary participation including the opportunity for the employee to consult an attorney before signing the agreement and a statement that explains what rights the employee relinquishes by signing it.

Still, employers may query: what does the EEOC's position on mandatory arbitration mean to private businesses who contemplate the use of such programs for resolving employee discrimination claims? Because a recent General Accounting Office survey indicated that virtually all private employers use some type of internal alternative dispute resolution mechanism to resolve disputes,¹⁵⁰ the answer is of great importance to private employers. The answer, however, is not entirely clear. On the one hand, companies may feasibly interpret the *River Oaks Imaging and Diagnostic* case as an extreme abuse of mandatory arbitration policies and, as such, would not apply as precedent to any subsequent or concurrent private corporate attempt to use mandatory arbitration in a more reasonable fashion. Yet, as noted above, the Commission's recent comments in its March 1995 report indicate that it discourages the use of mandatory arbitration as an internal dispute mechanism.¹⁵¹

¹⁴⁶ See *id.*

¹⁴⁷ See *id.* at 8-9.

¹⁴⁸ *Id.* at 22.

¹⁴⁹ See *id.* at 22-23.

¹⁵⁰ See *Discrimination: Nearly All Private Employers Use ADR to Resolve Bias Disputes*, GAO Study Finds, Empl. Pol. & L. Daily, July 7, 1995, available in LEXIS, BNA Library, BNA-ELD File, at d4.

¹⁵¹ See EEOC Report, *supra* note 140.

Risk-averse employers would be wise to avoid mandatory arbitration as a component of an internal ADR system for the time being and opt instead for programs of mediation or voluntary arbitration. More entrepreneurial companies, however, may seek to employ mandatory arbitration albeit with increased safeguards and standards that address the EEOC's concerns. Such programs may pass muster under the EEOC. For example, the Commission especially was concerned that alleged employment discrimination victims would not be able to file charges with the EEOC if employers used mandatory arbitration. A progressive mandatory arbitration policy would ensure that employees who signed the agreement were informed at the time of signing (and perhaps at the time of the arbitration filing) of the concomitant EEOC charge rights and procedures that the employee was foregoing by using mandatory arbitration. With such a safeguard, the alleged victim's recourse with the EEOC would not be compromised and the arbitration agreement, though pre-dispute, would become more "voluntary." Further safeguards may be implemented at the contracting stage as discussed in Part VII(B)(1), of this paper.

VI. PRIVATE ADR PROVIDERS: PROCEDURAL FAIRNESS ISSUES

In contrast to the Congressional and EEOC focus on the contracting stage, the two principle ADR providers, JAMS/Endispute¹⁵² and the American Arbitration Association (AAA),¹⁵³ have focused their responses to the rapid growth of mandatory arbitration after *Gilmer* on improving the *procedures* surrounding the arbitration process.

In December of 1994, JAMS/Endispute issued a policy statement outlining minimum standards of fairness for arbitration policies.¹⁵⁴ The policy statement was drafted in reaction to the concern over "company-

¹⁵² In June 1994, Endispute, Inc. merged with Judicial Arbitration and Mediation Services, Inc. (JAMS) and Bates Edward Group to form the present company, JAMS/Endispute. The corporation is a national full service alternative dispute resolution provider offering all types of dispute resolution services, including case evaluation, mediated discovery, mediation, arbitration, facilitation, consensus building and training seminars. JAMS/Endispute employs 300 ADR specialists and has offices in more than 30 cities. Last year, the corporation handled more than 16,000 ADR proceedings. See JAMS/ENDISPUTE, INTRODUCING JAMS/ENDISPUTE (corporate brochure) (1995).

¹⁵³ The AAA is a seventy year-old, not-for-profit public service organization based in New York. It is the largest provider of private dispute resolution. Last year, the AAA handled over 60,000 dispute resolution cases. Twenty-five percent of the cases were labor arbitrations. See AAA General Counsel Discusses Nonunion Employment Disputes, *supra* note 4.

¹⁵⁴ See JAMS/Endispute Issues Minimum Standards for Employment Arbitration, 6 World Arb. & Med. Rep. 50 (March 1995).

wide" mandatory employment arbitration policies being adopted by a large number of employers.¹⁵⁵ It would prevent JAMS/Endispute from accepting arbitrations in which the employer has imposed rules that restrict employees' rights or ability to collect damages.¹⁵⁶ Michael Young, senior mediator at JAMS/Endispute, questioned the mandatory arbitration process, remarking, "individuals will not be able to go to court . . . and there will have been minimal, if any, negotiation between the parties as to procedures or other terms of the arbitration clause."¹⁵⁷ Such concerns may have animated the JAMS/Endispute standards but are not immediately visible in the standards themselves. The JAMS/Endispute minimum arbitration standards include:

- (1) Ensuring that "rights and remedies" available under applicable statutes are also available in arbitration;
- (2) Providing for neutral arbitrators and ensuring that both participants select the arbitrators;
- (3) Providing that employee may be represented by counsel and should not be discouraged from such representation;
- (4) Providing that arbitration should include a minimum level of discovery, including document exchange and deposition of certain employer officials;

JAMS/Endispute encourages, but does not require:

- (1) Cost allocation between the employer and employee so that the employee is not precluded access to the procedures;
- (2) The requirement of a reasoned award, particularly in discrimination cases.¹⁵⁸

The JAMS/Endispute policy focuses mainly on the procedures of arbitration and, significantly, requires that the arbitrating employee retain the same avenues in the arbitration as she would in court. The standards, however, do not preclude mandatory arbitration altogether but seek to ensure fairness of the arbitration process once the employee encounters it.

The American Arbitration Association has been even more cautious in

¹⁵⁵ The JAMS/Endispute Policy applies only to company-wide arbitration agreements and not individually negotiated executive contracts. See Margaret A. Jacobs, *Workers Call Some Private Justice Unjust*, WALL ST. J., Jan. 26, 1995, at B1.

¹⁵⁶ JAMS/Endispute *Issues Minimum Standards for Employment Arbitration*, *supra* note 154, at 50.

¹⁵⁷ *Id.*

¹⁵⁸ See *id.* at 50-51.

its response to the criticisms of mandatory arbitration. AAA executives initially feared that adopting a policy similar to JAMS/Endispute's would scare off potential employers and hurt the AAA's ambitious marketing efforts.¹⁵⁹ Despite that concern, in June of 1995, the AAA implemented experimental arbitration rules in California for a one-year trial basis period.¹⁶⁰ The AAA rules were drafted by an AAA advisory group that obtained input from management, unions, plaintiffs and neutral arbitrators.¹⁶¹ The trial rules strive to infuse a "fundamental fairness [into the arbitration process] so the parties . . . are playing on an even field."¹⁶² The AAA rules include such safeguards as:

- (1) Procedures for neutral selection of an arbitrator;
- (2) An administrative conference to organize and expedite the arbitration; issues to be discussed at the conference include date, time, place and duration of hearing, resolution of outstanding discovery issues and parameters, exchange of stipulations and declarations regarding facts, exhibits, witnesses, witnesses' names and scope of testimony, form of award and other issues;
- (3) Provisions that the arbitrator may grant any remedy or relief deemed just and equitable, including, but not limited to, any remedy or relief that would have been available to the parties had the matter been heard in court;
- (4) Provisions that arbitrators shall award any fees, expenses and compensation in favor of any party, including any administrative fees or expenses due AAA;
- (5) Reduction in the filing fees for the arbitration; and
- (6) Provisions that arbitrator's award should be in writing.¹⁶³

Similar to the JAMS/Endispute rules, the AAA rules focus almost exclusively on procedural safeguards of arbitration. The AAA rules provide that participants of the arbitration may obtain the same relief they would in court, but the arbitrators are not limited by such relief.¹⁶⁴ Thus, under the AAA rules, an employer potentially may draft an arbitration agreement that

¹⁵⁹ See Jacobs, *supra* note 155, at B5.

¹⁶⁰ See *New Rules for Employment Disputes Make Arbitrators' Authority Explicit*, *Empl. Pol. & L. Daily*, May 31, 1995, available in LEXIS, BNA Library, BNA-ELD File, at d2.

¹⁶¹ See *id.*

¹⁶² *Id.*

¹⁶³ AMERICAN ARBITRATION ASSOCIATION, CALIFORNIA EMPLOYMENT DISPUTE RESOLUTION RULES (1995).

¹⁶⁴ See *id.*

adheres to all AAA standards and limits the relief, including punitive damages, that may be obtained by employees.

Both the AAA and JAMS/Endispute rules seem to presume the acceptability of binding arbitration, and instead focus on improving fairness procedures once a potential claimant's judicial avenues have been foreclosed. While these efforts are admirable, they should be monitored continually and improved or discarded as necessary. Finally, such efforts at improving process should be complemented by efforts to improve voluntariness at the contracting stage and expand availability of judicial review as suggested in Part VIII(B), *infra*.

VII. LABOR POLICY GROUPS: MORE PROCEDURAL SAFEGUARDS

At least two policy groups, the Task Force on ADR in Employment ("ADR Task Force") and the United States Departments of Labor and Commerce Dunlop Commission, have taken a similar approach as the private ADR providers; that is, they have focused on improving the *procedures* surrounding arbitration itself, rather than attempting to affect mandatory arbitration at the *contracting* stage.

In August of 1994, the American Bar Association Committee on Labor Arbitration and the Law of Collective Bargaining Agreements created a "Task Force on Alternative Dispute Resolution in Employment," which included members of the ABA section, representatives of the National Academy of Arbitrators, the American Civil Liberties Union, the American Arbitration Association, the Federal Mediation and Conciliation Service and others, to recommend standards for arbitration that would ensure due process for all participants.¹⁶⁵ One member of the Task Force, Arnold Zack, stated that arbitration guidelines were needed for private agreements because "some people see this type of arbitration as rigged."¹⁶⁶ On May 9, 1995, the ADR Task Force approved a prototype for extending due process rights to employees in statutory arbitrations involving nonunion workers. The prototype recommends a number of procedural safeguards, including the following:

- (1) Employees should have the right of representation of their own choosing; employers should reimburse part of legal expense for a portion of the employees' fees;
- (2) All participants should have adequate but limited pre-trial

¹⁶⁵ NAA President Outlines Proposals for ADR Standards in Non-Union Setting, *Empl. Pol. & L. Daily*, Feb. 17, 1995, available in LEXIS, BNA Library, BNA-ELD File, at d10.

¹⁶⁶ ADR Task Force Approves Prototype for Arbitration of Statutory Rights, *Empl. Pol. & L. Daily*, May 12, 1995, available in LEXIS, BNA Library, BNA-ELD File, at d7.

- discovery;
- (3) Arbitrators should be qualified and should have skills in the conduct of hearings, knowledge of the statutory issues at stake in the dispute and familiarity with the workplace and employment environment. There is a need for arbitrators with special expertise, and there may be a need to reexamine rostering eligibility of such agencies as the AAA to permit expedited inclusion of those with valuable expertise;
 - (4) There is need for a training program to educate existing and potential arbitrators as to statutes, including substantive, procedural and remedial issues to be confronted and to train experts in the statutes regarding employer-employee relationships. Such training should be provided by government agencies, bar associations and academic institutions, and should be administered by a designating agency such as the AAA; and
 - (5) Arbitrators will have the authority to award whatever relief is available in court under the law, and the arbitrator should issue a written opinion.¹⁶⁷

The ADR Task Force's Prototype Agreement focuses on procedural safeguards and offers the same types of protective measures as do the JAMS/Endispute and AAA efforts. The Task Force's proposal, however, places additional emphasis on adequate training of arbitrators. Currently, the National Academy of Arbitrators, the ABA Labor and Employment Law Section and the Employment Lawyers Association have endorsed the ADR Task Force Protocol.¹⁶⁸ The Society of Professionals in Dispute Resolution (SPIDR), however, has not endorsed the Protocol.¹⁶⁹ The Task Force could not reach a consensus on certain issues, including whether an agreement to arbitrate should be a condition of employment and whether employees should be permitted to waive their right to judicial relief.¹⁷⁰ The Task Force, then, officially did not denounce pre-dispute arbitration but instead sought to protect participants indirectly by ensuring that an employee facing such an arbitration would encounter fair procedures.¹⁷¹

¹⁶⁷ *Prototype Agreement on Job Bias Dispute Resolution*, Daily Lab. Rep. (BNA) No. 91, d34 (May 11, 1995).

¹⁶⁸ *ABA Committee Debates Guidelines for Arbitrating Statutory Rights Disputes*, Empl. Pol. & L. Daily, Aug. 10, 1995, available in LEXIS, BNA Library, BNA-ELD File, at d9.

¹⁶⁹ *See id.*

¹⁷⁰ *See ADR Task Force Approves Prototype for Arbitration of Statutory Rights*, *supra* note 166.

¹⁷¹ *See id.*

Another policy group, the Commission on the Future of Worker-Management Relations (Dunlop Commission), issued its Report and Recommendations in January of 1995. The Dunlop Commission was more outspoken than the ADR Task Force in denouncing mandatory arbitration but not in offering suggestions for reform. The Commission, created by the United States Departments of Labor and Commerce and chaired by former Secretary of Labor John Dunlop, was charged with determining ways that workplace disputes can be directly resolved by the parties involved rather than through recourse to the courts and government agencies.¹⁷² In an interim "Fact-Finding Report" issued in early June 1994, the Commission spoke of the possibility that arbitration may be more widely used in the nonunion setting because it had been an effective process in the collective bargaining setting.¹⁷³

The January 1995 Report, however, suggests that binding arbitration agreements should not be enforceable as a condition of employment. The Report calls for the courts to interpret the FAA as prohibiting mandatory arbitration, and, failing court action, the Report calls for Congress to pass legislation making it clear that any choice between available methods for enforcing statutory employment rights should be left to the individual who feels wronged rather than to the employment contract.¹⁷⁴ The Report cryptically adds the caveat that its current view may be re-evaluated in the future as employers experiment with ADR systems.¹⁷⁵ The Dunlop Commission suggests (1) that private parties should be encouraged to adopt in-house ADR systems, including in-house settlement procedures and voluntary systems that meet fairness standards, and (2) that private arbitration systems meet key quality standards.¹⁷⁶ The Commission recommends that an arbitration system, if it is to ensure effective protection of employees' substantive legal rights, must include:

- (1) a neutral arbitrator who knows the laws in question;
- (2) a fair and simple method by which the employee can secure the necessary information to present his or her claims;
- (3) a fair method of cost-sharing between the employer and employee to ensure affordable access to the system for all

¹⁷² See *Dunlop Panel Hears Alternative for Resolving Workplace Disputes*, Daily Lab. Rep. (BNA) No. 188, d31 (Sept. 30, 1994).

¹⁷³ See *id.*

¹⁷⁴ UNITED STATES DEPARTMENTS OF LABOR AND COMMERCE, REPORT AND RECOMMENDATIONS OF THE COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS 42 (Jan. 1995), cited in Daily Lab. Rep. (BNA) No. 6, d55 (Jan. 10, 1995).

¹⁷⁵ See *id.*

¹⁷⁶ See *id.* at 37.

- employees;
- (4) the right to independent representation for the employee;
- (5) a range of remedies equal to those available through litigation;
- (6) a written opinion by the arbitrator explaining the rationale for the result; and
- (7) sufficient judicial review to ensure that the result is consistent with the governing laws.¹⁷⁷

Like the ADR Task Force Report, the Dunlop Commission recommendation paints procedural fairness issues in broad strokes and gives little substantive protection to the employee at the contracting stage. Although the Dunlop Commission rejects the use of mandatory arbitration at the contracting stage, it does not thoroughly detail its critique of the arbitration process, thus shedding little light on the Commission's view of the problems at the contracting stage and the reasons why they find pre-dispute arbitration unacceptable.¹⁷⁸

VIII. FUTURE DIRECTIONS OF MANDATORY ARBITRATION

A. Summary of Employment Actors' Responses

The various employment community actors have focused their responses to mandatory arbitration after *Gilmer* primarily on the procedural fairness stage of arbitration and, to some degree, the contracting stage. The private ADR providers, AAA and JAMS/Endispute, have implemented rules that largely seek to improve the procedures surrounding the arbitration process. The policy groups, ADR Task Force and the Dunlop Commission, also have issued recommendations for improving arbitration at the procedural stage. Of those groups that have concentrated their responses on the contracting stage of arbitration, two of them, Congress and the Dunlop Commission, simply condemn the mandatory arbitration process altogether and fail to focus on specific problematic areas or suggest solutions at the contracting stage. Only the EEOC and, recently, the Ninth Circuit have begun to address specific problems at the contracting stage, such as the employee's lack of notice when signing a compulsory agreement. Virtually none of the actors speak of the judicial review process. The courts themselves have been loathe to reverse arbitration decisions involving statutory employment rights, and only one such case has been reversed for lack of arbitrator impartiality.

¹⁷⁷ See *id.* at 40.

¹⁷⁸ See *id.* at 42.

B. Future Directions of Mandatory Arbitration

Although some commentators would advocate the abolition of mandatory arbitration of civil rights claims altogether, it is unlikely that mandatory arbitration will disappear from the employment horizon in the near future. The federal courts virtually have embraced pre-dispute arbitration of civil rights after the *Gilmer* decision, and reform efforts by other employment actors have been piecemeal at best and ineffective at worst. In the current employment atmosphere, where businesses are looking to arbitration as a panacea to exorbitant court fees and lengthy litigation, the employment community needs an approach to arbitration that retains mandatory arbitration yet also improves upon it.

The preceding analysis of the employment community response to mandatory arbitration has focused on the three stages of mandatory arbitration, from contracting to procedural issues to judicial review. As mentioned above, much effort from private ADR providers and labor policy groups has focused on improving fairness procedures during the arbitration process. While such efforts should be applauded and encouraged, they alone are not enough. A more rational scheme for improving mandatory arbitration should focus on improving the process of the remaining two stages of the arbitration process: initial contracting and judicial review. Without a tandem effort to improve all three stages, the pre-dispute arbitration process risks trampling employee civil rights.

1. Fairness at the Contracting Stage

A functional approach to ensuring fairness for employees facing the signing of an arbitration contract is to increase the protections at the contracting stage. Employees should be given the opportunity to sign the contract and waive the right to a judicial forum for impending civil rights claims, but they only should be allowed to do so if they are provided the opportunity to fully understand the essence of mandatory pre-dispute arbitration and the concomitant release of certain rights to which they are entitled. Contracting procedures should be improved to ensure an employee's informed and knowledgeable waiver. The recent Ninth Circuit *Lai* decision,¹⁷⁹ as well as the EEOC's response to River Oaks Imaging and Diagnostic's ADR program¹⁸⁰ suggest criteria for improvement. Other safeguards may be modeled after the OWBPA waiver provisions.¹⁸¹

¹⁷⁹ See *Lai*, 42 F.3d at 1299.

¹⁸⁰ See EEOC Memorandum in Support of Preliminary Injunction, *supra* note 145.

¹⁸¹ See OWBPA, 29 U.S.C. §§ 626(f)(1)-(4) (1994), providing, in part:

NONUNION PRE-DISPUTE CIVIL RIGHTS ARBITRATION

Certain uniform standards should govern the signing of mandatory arbitration contracts: (1) an employee's right to court adjudication may not be waived without a signed contract to such effect; (2) the employee's waiver of her rights should be knowing and voluntary; and (3) an employee may not be terminated for failure to sign a document waiving her right to a court adjudication.

a. Knowing and Voluntary Signed Waiver

The first two criteria have a close relationship to one another; an employee's knowing and voluntary waiver may not be obtained if the employee does not have the opportunity to read and sign a contract to such effect. The mandatory arbitration provision should not be printed solely in an employee handbook¹⁸² or other company policy statement, but should

(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. . . . [A] waiver may not be considered knowing and voluntary unless at a minimum—

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by the individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this chapter;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F)(i) the individual is given a period of at least 21 days within which to consider the agreement. . . .

Id.

¹⁸²The Ninth Circuit's *Nghiem* decision may indicate that arbitration agreements incorporated from a handbook are enforceable, but *Nghiem* should be narrowly construed to its own facts. In *Nghiem*, the Ninth Circuit affirmed a lower court's decision that a former employee of NEC was bound by an arbitrator's ruling in an arbitration between the employee and NEC. The employee, however, had *voluntarily* submitted to arbitration in accordance with NEC's handbook. Although not reaching the issue of whether the employee could have been compelled to arbitrate his claims beforehand, the court did note that the FAA only requires that an arbitration agreement be in writing, but does not require that the agreement be signed by the parties thereto. Thus, *Nghiem* does not support the rationale that an employee handbook can form a binding arbitration agreement because the court found the employee had waived his right to object because he submitted to arbitration. See *Nghiem*, 25 F.3d at 1439.

instead be in the form of a separate contract that places the employee on notice of the potential waiver.¹⁸³ The contract should state in clear, specific and unambiguous language the terms of the arbitration agreement, and should contain a provision explaining the rights and claims an employee is potentially sacrificing, such as the employee's right to file charges with the EEOC. Businesses should be encouraged to place the notice provision on the first page of the contract.¹⁸⁴

The requirement of a contract signed both knowingly and voluntarily by the employee is culled from the OWBPA provisions, the *Lai* decision and the *River Oaks Imaging and Diagnostic* case. The OWBPA permits waiver of the rights it seeks to protect, but only under certain circumstances if the requisite safeguards are present. Under OWBPA Sections 626(f)(1)(A) and (B), a waiver of rights under the Act is knowing and voluntary if it is part of an agreement *written in a manner calculated to be understood by the individual* and it *specifically refers to rights or claims*.¹⁸⁵ By analogy, a pre-dispute arbitration contract seeking to preclude a claimant from seeking judicial review of her claim under a civil rights statute should be a clearly written agreement that specifically details the rights and claims an employee relinquishes by signing the agreement.

The Ninth Circuit's recent *Lai* decision buttresses this criteria. In *Lai*, the plaintiff-appellants were not bound by an agreement to arbitrate their Title VII claims because the contract they signed did not describe the types of disputes that would be subject to arbitration.¹⁸⁶ The *Lai* court's requirement of notice, then, was the description of the types of suits to be arbitrated.¹⁸⁷ The proposed reforms incorporate the *Lai* rationale.

The *River Oaks Imaging and Diagnostic* Preliminary Injunction Order pushes further along the requirement of notice and requires that employees may sign an arbitration agreement only if such an agreement is accompanied by a letter drafted by the EEOC that details the employee's rights to file charges with the EEOC and any substantive and procedural rights which

¹⁸³ See *id.*

¹⁸⁴ However, state law efforts to require parties to place arbitration agreements conspicuously on the front page of contracts have recently been struck down by the United States Supreme Court. See, e.g., *Doctor's Assocs., Inc. v. Casarotto*, 116 S. Ct. 1652 (1996); *Allied-Bruce Terminix Cos. v. Dobson*, 115 S. Ct. 834 (1995). See also *infra* notes 193-199 and accompanying text.

¹⁸⁵ See OWBPA, 29 U.S.C. § 626 (f)(1)(A) and (B) (1988 and Supp. 1995).

¹⁸⁶ See *Lai*, 42 F.3d at 1305 (finding that employees could not have understood U-4 form when signing it because it did not describe types of disputes subject to arbitration, nor did it mention Title VII claims).

¹⁸⁷ See *id.*

may be sacrificed if the employee makes an ADR election.¹⁸⁸

Both the Ninth Circuit and the EEOC have addressed the problem of notice and voluntariness in pre-dispute arbitration contracts. The reforms suggested here incorporate the respective ideas of the federal court and the EEOC, and use the OWBPA as a model to provide the framework for ensuring fairness in the process through which employees waive their rights to a judicial forum.

b. Opportunity for Review; Consideration; No Retaliation for Refusal to Sign

Additional safeguards that should surround the contracting of pre-dispute arbitration are: (1) the contract clearly should state that the employee has the right to consult with attorneys, and (2) the employer should provide ample opportunity for the employee to seek legal advice or review of the document. The employee also should have sufficient time to deliberate before signing the document; a suggested time is twenty-one days.

Finally, current employees who are given the opportunity to sign an arbitration agreement adopted by the corporation *after* an employee has begun working should receive some consideration for the signing of the agreement. An employee who refuses to sign the arbitration agreement should not be terminated in retaliation.

Again, the OWBPA provides a model for the proposed contracting reforms. Under OWBPA Sections 626(f)(1)(E) and 626(f)(1)(F)(i), a waiver is knowing and voluntary if an individual is advised in writing to consult with an attorney prior to executing the agreement and given a period of at least twenty-one days to consider the agreement.¹⁸⁹ The OWBPA also provides that the waiver must be exchanged for value if it is to be valid.¹⁹⁰

The Preliminary Injunction Order in *River Oaks Imaging and Diagnostic* prohibited the partnership from retaliating against current and former employees for refusing to sign the arbitration agreement.¹⁹¹ The

¹⁸⁸ See *River Oaks Imaging and Diagnostic*, 1995 WL 264003 (S.D. Tex. Apr. 19, 1995), Preliminary Injunction Order (holding that ROID may introduce revised ADR Policy which employees may sign only if accompanied by a letter drafted by the EEOC, which explains the employees' rights to file charges with the EEOC and any substantive and procedural rights which may be sacrificed if an ADR election is made).

¹⁸⁹ See OWBPA, 29 U.S.C. §§ 626(f)(1)(E) & 626(f)(1)(F)(i).

¹⁹⁰ See OWBPA, 29 U.S.C. § 626(f)(1)(D) (waiver is knowing and voluntary if individual waives rights or claims in exchange for consideration in addition to anything of value to which individual already is entitled).

¹⁹¹ See *River Oaks Imaging and Diagnostic*, 1995 WL 264003 (S.D. Tex. Apr. 19,

court's concern in *River Oaks Imaging and Diagnostic* is pivotal: If retaliatory firing is not prohibited in reforms surrounding the contractual stage of pre-dispute arbitration, the notion of voluntariness is compromised and other potential safeguards will become meaningless.

The suggested safeguards are not exclusive and should provide a baseline for discussion and dialogue among employment community actors. The focus on ensuring fairness at the contracting stage of pre-dispute arbitration will provide a solid framework of protections for employees who are faced with such agreements. These suggested elements and others like them should be required before an employer imposes mandatory arbitration upon an employee. While according to the Supreme Court in *Gilmer*, mere inequality in bargaining position may not be enough to nullify an arbitration agreement,¹⁹² these safeguards seek to level the playing field for employers and employees.

The implementation of the suggested reforms at the contracting stage may not be accomplished directly by state statute in light of a recent Supreme Court decision that interprets the FAA as upholding the validity of arbitration provisions in contracts unless the contract itself could be invalidated under state contract law principles. This decision, however, does not spell the end for relief at the contracting stage but rather changes the focus of the implementation. If state legislation is not viable, then the FAA itself could be amended to include reforms, or private ADR providers such as AAA and JAMS/Endispute indirectly could enforce such reforms by refusing to accept arbitrations that did not adopt the proposed safeguards in the arbitration contracts.

In *Doctor's Associates, Inc. v. Casarotto*,¹⁹³ the United States Supreme Court held that the Federal Arbitration Act preempted a Montana statute that attempted to provide better protection for individuals at the contracting stage of arbitration. The Montana statute declared an arbitration clause unenforceable unless notice that the contract is subject to arbitration is typed in underlined capital letters on the first page of the contract.¹⁹⁴ Following that law, the Montana Supreme Court invalidated an arbitration contract contained in a franchise agreement because the arbitration clause was located on page nine in ordinary type.¹⁹⁵ The United States Supreme Court then granted certiorari for the first time in 1995, and vacated and remanded

1995), Preliminary Injunction Order at 3.

¹⁹² See *Gilmer*, 500 U.S. at 33.

¹⁹³ 116 S. Ct. 1652 (1996).

¹⁹⁴ See MONT. CODE ANN. § 27-5-114(4) (1995).

¹⁹⁵ See *Casarotto v. Lombardi*, 886 P.2d 931 (Mont. 1994), vacated *sub nom.* *Doctor's Assocs., Inc. v. Casarotto*, 115 S. Ct. 2552 (1995).

the case to Montana.¹⁹⁶ On rehearing, the Montana Supreme Court reaffirmed the prior opinion, relying on its earlier reasoning that the Montana statute was not inconsistent with the goals and policies of the FAA and thus was valid.¹⁹⁷ In its most recent decision, the United States Supreme Court again reversed the Montana Supreme Court and clarified its position regarding the Montana law.¹⁹⁸ The Court held that the state courts may not "invalidate arbitration agreements under state laws applicable *only* to arbitration provisions" and that arbitration provisions may not be "singled out" for "suspect status."¹⁹⁹

Although *Casarotto* makes clear that state laws may not find arbitration provisions to be lacking simply because participants were not given adequate notice, reform efforts should not be long stymied but rather redirected. Even if state legislatures cannot single out suspect arbitration clauses, other employment community actors should continue the battle in their respective sectors.

2. Increased Availability of Judicial Review

The *Gilmer* Court effectively invited the employment community to experiment with the procedures surrounding mandatory arbitration, noting that "the claimed procedural inadequacies [that Plaintiff *Gilmer* alleges] . . . [are] best left for resolution in specific cases."²⁰⁰

Since *Gilmer*, as this Article recounts, the employment community has struggled with the "experimentation" of procedural issues surrounding mandatory arbitration. The private ADR providers and labor groups have focused their efforts on improving the procedures surrounding the arbitration process itself. For their part, the federal courts have struggled with the process of judicial review, but constrained by the narrow grounds of review under the FAA, they have overturned an employee arbitration only once.

The important status of civil rights in the fabric of the employment relationship dictates that more experimentation with judicial review of arbitration in the federal courts is necessary. And, as Professors Martin Malin and Robert Ladenson discuss in a 1993 article, increased availability of judicial review of arbitration decisions is especially crucial in the private arbitration context because of the lack of accountability in a single system of

¹⁹⁶ See *Doctor's Assocs., Inc. v. Casarotto*, 115 S. Ct. 2552 (1995).

¹⁹⁷ See *Casarotto v. Lombardi*, 901 P.2d 596 (Mont. 1995), *rev'd sub nom. Doctor's Assocs., Inc. v. Casarotto*, 116 S. Ct. 1652 (1996).

¹⁹⁸ *Casarotto*, 116 S. Ct. 1652 (1996).

¹⁹⁹ *Id.* at 1746.

²⁰⁰ *Gilmer*, 500 U.S. at 33.

public anti-discrimination law.²⁰¹ The danger is great that individual private employment arbitrators will apply a law such as Title VII in a conflicting manner; such danger largely goes unchecked because of the unavailability of judicial review. Without more substantive review by a uniform judicial system, private arbitration runs the risk of diminishing the effect and understanding of our public anti-discrimination laws because employers and employees alike will not have a uniform standard of the boundaries of discriminatory action.

The current system of judicial review under the FAA is severely limited and is inadequate to ensure the protection of civil rights. This Article proposes that the FAA should be amended to allow additional substantive grounds for judicial review.

3. Proposed Amendment to the FAA

Judicial review of arbitration decisions purposely is circumscribed under the FAA to promote the finality, and thus the viability, of arbitration as an alternative to judicial remedies.²⁰² Accordingly, Section 10 of the FAA is highly tailored to instances where a court may overturn an arbitrator's decision; only where there is arbitrator fraud, partiality or misconduct in procedural issues may the district court vacate the arbitration.²⁰³ In addition, many courts have reformulated Section 10(4), which allows a court to vacate the decisions of arbitrators when they have exceeded their powers or imperfectly executed them, to allow vacation of arbitral awards for "manifest disregard of the law."²⁰⁴ The manifest

²⁰¹ See Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the Steelworkers Trilogy to Gilmer*, 44 HASTINGS L.J. 1187, 1227 (1993). The authors contrast private employment arbitration with arbitration in the labor law context which does not involve public law interpretation but rather application of private collective bargaining agreements. See *id.*

²⁰² See, e.g., *Inter-City Gas Corp. v. Boise Cascade Corp.*, 845 F.2d 184 (8th Cir. 1988) (holding that judicial review of arbitration awards is restricted and courts will not review merits of awards).

²⁰³ See 9 U.S.C. §§ 10(a)-10(e) (1994).

²⁰⁴ See, e.g., *Health Servs. Management Corp. v. Hughes*, 975 F.2d 1253 (7th Cir. 1992); *Todd Shipyards v. Cunard Line, Ltd.*, 943 F.2d 1056 (9th Cir. 1991); *Fahnestock & Co. v. Waltman*, 935 F.2d 512 (2d Cir.), *cert. denied*, 502 U.S. 942 (1991) and 502 U.S. 1120 (1992); *Employers Ins. v. Nat'l Union Fire Ins. Co.*, 933 F.2d 1481 (9th Cir. 1991); *O.R. Sec., Inc. v. Professional Planners Assoc.*, 857 F.2d 742 (11th Cir. 1988); *Jenkins v. Prudential-Bache Sec., Inc.*, 847 F.2d 631 (10th Cir. 1988); *Stroh Container Co. v. Delphi Indus., Inc.*, 783 F.2d 743 (8th Cir.), *cert. denied*, 476 U.S. 1141 (1986); *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930 (2d Cir. 1986).

disregard doctrine is formulated largely from dicta in the 1953 Supreme Court case *Wilko v. Swan*,²⁰⁵ and the federal courts are split in its efficacy to arbitral review.²⁰⁶ Notwithstanding the attention given its application by many courts, the manifest disregard standard is a stringent one and does little to provide additional grounds for substantive review by the judiciary.²⁰⁷ Thus, because the grounds for vacation are so narrow, an effective change in the availability of judicial review can only be accomplished by direct amendment of the FAA. The statute should be amended to correct the inadequacies of the current review system for mandatory arbitration.

This Article suggests a proposed amendment to the FAA that would allow courts to vacate arbitration awards when the *arbitrators have misapplied or misinterpreted applicable law*. The amendment to allow review of misapplied law strikes a balance between the manifest disregard doctrine adopted by some federal circuits and de novo review of all questions of law considered in arbitration.

Currently, the circuit courts do not agree on the elements or the application of the manifest disregard doctrine. Yet, as some commentators

²⁰⁵ 346 U.S. 427 (1953), *overruled by* *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). In *Wilko*, the Court states in dicta: "the interpretation of the law by arbitrators in contrast to *manifest disregard* are not subject, in the federal courts, to judicial review for error in interpretation." *Wilko*, 346 U.S. at 436-437 (emphasis added).

²⁰⁶ The Second, Ninth and D.C. Circuits have formally adopted the manifest disregard standard. *See, e.g., Sargent v. Paine, Webber, Jackson & Curtis, Inc.*, 882 F.2d 529 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1028 (1990); *Bobker*, 808 F.2d at 933-934; *French v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 784 F.2d 902 (9th Cir. 1986). The Fourth, Seventh, Eighth and Eleventh Circuits have heard cases on the issue but have not formally adopted or rejected the standard. *See, e.g., Miller v. Prudential-Bache Sec., Inc.*, 884 F.2d 128 (4th Cir. 1989), *cert. denied*, 497 U.S. 1004 (1990); *O.R. Securities*, 857 F.2d 742; *Stroh Container*, 783 F.2d 743; *MSP Collaborative v. Fidelity & Deposit Co.*, 596 F.2d 247 (7th Cir. 1979). Only the Fifth Circuit has expressly refused to adopt the manifest disregard standard. *See R.M. Perez & Assoc. v. Welch*, 960 F.2d 534, 590 (5th Cir. 1992).

²⁰⁷ *See, e.g., Bobker*, 808 F.2d at 933 (finding that "[m]anifest disregard . . . means more than error or misunderstanding with respect to the law [T]he term 'disregard' implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it."). *See also* Christine Godsil Cooper, *Where Are We Going with Gilmer?—Some Ruminations on the Arbitration of Discrimination Claims*, 11 ST. LOUIS U. PUB. L. REV. 203, 217 (1992). Prof. Cooper has suggested that in sexual harassment arbitration, an arbitral award would not be vacated by a court if an arbitrator mistakenly states that Title VII does not cover sexual harassment. Instead, she suggests, the award would only be vacated under manifest disregard principles if the arbitrator stated that he knew Title VII prohibited the conduct but refused to apply it. *See id.*

note, in its strictest form, the doctrine will only allow judicial courts to reverse the arbitration award in extreme cases when, an arbitrator refuses to apply what she knows to be the applicable law.²⁰⁸ The stringency of the extreme interpretation manifest disregard doctrine makes it a less-than-ideal substitute for a more moderate statutory amendment that uniformly adopts a standard for judicial review that applies when the law is misinterpreted in light of settled precedent. At the polar extreme from the strict manifest disregard doctrine is the similarly dissatisfactory option of allowing judges *de novo* review of arbitration decisions.²⁰⁹ This standard also is unattractive because it would allow arbitration participants too much access to the courts and would undermine the benefit of arbitration as a binding and final alternative to the court system. A better option is a judicial review standard that only allows judges to reverse opinions for misapplication of the law because it preserves the finality of arbitration yet also protects its participants from the misuse of laws, especially those involving civil rights.

The proposed standard of review for arbitration decisions places the burden on the party seeking reversal to show that the law was misapplied. To safeguard the binding quality of arbitration and discourage automatic appeals, a party seeking review should be required to: (1) make a *prima facie* case that a law applies in her case; (2) show that the law has a relatively standard application as applied by the courts and list the elements of the law with supporting precedent; and (3) detail the arbitrator's application of the law in the decision, illustrating where the law was misapplied or misinterpreted.

This judicial reform effort is a starting point for discussion and analysis in the courts, the legislature and the employment community. Later commentators and actors in the arbitration process will need to develop certain factors in the process to allow judicial reform to work effectively. For instance, a judicial review standard that places the burden on the appealing party is dependent upon the requirement of a written, well-reasoned arbitration decision. Although many arbitration actors have suggested such a requirement,²¹⁰ in the future, written opinions must be more than an option for arbitrators; they must be a requisite component of a valid arbitration because a reviewing court may need the opinion.

An additional factor to be debated in the employment community is the requirement that the moving party demonstrate the established application of the law in order to allege that the arbitrator misapplied it. Such a requirement likely will have the effect of discouraging arbitration appeals

²⁰⁸ See, e.g., Cooper, *supra* note 207, at 217.

²⁰⁹ See Malin & Ladenson, *supra* note 201, at 1240. Malin and Ladenson suggest that courts review arbitral awards *de novo* for conclusions of law. See *id.*

²¹⁰ See *supra* Parts VI & VII.

where applicable law does not have a standard application in reported precedent, either because it is recently enacted and courts have not had the opportunity to consider it or because it is broadly drafted so as to allow no single application. In such a case, a moving party will find it more difficult to prove her case and have an appeal heard in court. This "cost" may be a necessary one that is outweighed by the benefits of preserving the finality of arbitration by adopting a judicial review standard that is not dangerously over-broad.

Finally, the interaction between the two proposed reforms in this paper needs to be addressed. The first reform focuses on improving disclosure procedures at the contracting stage of a mandatory arbitration agreement in order to ensure that the process becomes a voluntary choice for its participants.²¹¹ In this regard, the suggestions for improving the voluntariness of the arbitration essentially strive to erase the distinction between pre- and post-dispute arbitration. The ultimate goal, then, of the mandatory arbitration contracting reforms is the creation of a pre-dispute arbitration commitment that is equivalent to a post-dispute arbitration commitment, with the only distinction being the timing of the agreement rather than the voluntary nature of the judicial forum waiver.

Thus, in recognition of that goal, the suggestions for reform at the judicial review stage do not distinguish between pre- and post-dispute arbitrations but apply to *all* arbitration decisions regardless of origin. It is essential that the two reforms occur in tandem with one another as well as with continued reform of the procedures surrounding arbitration. A piecemeal reform effort will only serve to weaken the effect of the respective proposals so that little substantive improvement in pre-dispute contracting will occur.

IX. CONCLUSION

Since *Gilmer*, the federal courts and other labor and employment actors have endorsed the use of pre-dispute arbitration as a mechanism for resolving employee civil rights disputes. Many actors in the employment community, however, continue the struggle to improve the equity of the process for its participants. Private ADR and legal and governmental policy groups are making headway by experimenting and improving upon the procedural fairness of arbitration itself, but the employment community must expend more effort in improving the arbitration process at both the contracting and judicial review stages. An employee faced with a pre-dispute arbitration contract should be ensured of procedural fairness in arbitrating the claim, but she also should be well-informed of the costs of

²¹¹ See *supra* Part VIII.B.1.

signing the document and assured of an opportunity for judicial review if the law is incorrectly applied. Mandatory arbitration, if it is to function as a palatable alternative to litigation and a cost-effective option for employers, must gain comparable credibility in the eyes of its participants by becoming a more voluntary and informed dispute resolution option.